Supreme Court, U.S.
FILED
MAR - 5 2001
OFFICE OF THE CLERK

NO. 01392

IN THE
SUPREME COURT OF THE UNITED STATES

CHERIE SHIPP, JERRY GATES

Petitioners

VERSUS

ROYCE L. MCMAHON, Sheriff of Webster Parish, Louisiana; Webster Parish Deputy Sheriffs STEVE CROPPER and BETTY SHIPP, and THEODORE RISER, JR., Sheriff of Webster Parish, Louisiana

Respondents

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

May a circuit court disregard "a consensus of cases of persuasive authority," *Wilson v. Layne*, 526 U.S. 603, 617 (1999), from other circuits in ascertaining clearly established law for purposes of qualified immunity?

2.

Was it clearly established in 1996 that law enforcement officers could not refuse to protect a woman from domestic violence because of her gender?

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT:

Petitioner, Cherie Shipp, respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on December 5, 2000.

OPINION BELOW

The (substitute) Opinion of the United States Court of Appeals for the Fifth Circuit, entered on December 5, 2000, is reprinted in the Appendix to this Petition at App. I.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its original Opinion (App. H) on January 7, 2000. Pursuant to petition for rehearing *en banc* filed January 21, 2000, panel rehearing was granted and the substitute Opinion (App. I) entered on December 5, 2000.

This Court has jurisdiction to review the judgment of the United States Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment of the United States Constitution.

Fourth Amendment of the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

This petition seeks review of a dismissal under Fed. R. Civ. P. 12(b)(6) on the basis of qualified immunity. The district court, which had jurisdiction of this civil rights action under 28 U.S.C.§§1331 and 1343(a)(3) and (4), denied the motion to dismiss and the circuit court affirmed. *Shipp v. McMahon*, 199 F.3d 256 (5th Cir. 2000) (App. H). Eleven months later, however, on reconsideration, the circuit court reversed itself and the court below, 234 F.3d 907 (5th Cir. 2000) (App. I). The following facts are taken from the circuit court's opinion.

Plaintiff Cherie Shipp was involved in an abusive marriage with her husband, Dalton Shipp. In late October, 1995, she tried to escape by moving to her sister's house, but Dalton found her, subjected her to threatening phone calls and on several occasions drove by her sister's home. Ms. Shipp reported these incidents to Webster Parish Sheriff's deputies, including defendant Steve Cropper, but Cropper refused to do anything.

Ms. Shipp moved to her cousin's house, but her husband found her again. This time, he beat her with a telephone and hit her with his fist. Ms. Shipp again reported the abuse to Deputy Cropper, who took a report but did not make an arrest. Instead, Dalton was allowed to turn himself in on misdemeanor charges arising from the incident, to which he pled guilty. The Court ordered counseling, and set sentencing for a later date. As a condition of bail, it ordered Dalton to stay away from his wife. Ms. Shipp also obtained a temporary restraining order prohibiting her husband from any contact with her.

Dalton then violated the TRO and the bail condition with several abusive and threatening phone calls, which Ms. Shipp reported to the Webster Parish Sheriff's Office. Again, she was told nothing could be done. Still, Dalton was not arrested.

When Dalton failed to appear in court for sentencing, a Bench Warrant was issued for his arrest. Although he appeared thereafter in court to answer other unrelated criminal charges, the deputies nonetheless failed to arrest him on the Bench Warrant.

Ms. Shipp moved to another sister's residence, but Dalton tracked her down during the late evening hours of May 19, 1996. He convinced her to get into his car to talk to him. But as soon as she did, Dalton sped away and drove her to a

house that he had leased. Ms. Shipp's family notified the WPSO. Betty Shipp, Dalton's mother and a WPSO dispatcher, received the call and hung up before inquiring into the particulars. Dalton's mother told Deputy Cropper, but again, Cropper chose to take no action.

Ms. Shipp's mother called the Minden Police Department next, which dispatched an emergency alert and radioed the WPSO. Ms. Shipp's father, Jerry Gates, found Deputy Cropper at the courthouse, and denounced his inaction. Gates said he was going to Dalton's house himself, and Cropper and another deputy pursued him.

When the deputies, including Cropper, arrived at Dalton's house, they made no effort to enter the house. Rather, they knocked on the door, explaining that they had to ascertain whether Ms. Shipp was voluntarily in the house with Dalton. A shot then rang out from the house. The deputies retreated to their vehicles for armored vests, and another shot rang out as the deputies crouched behind their cars. Inside the house, Dalton had raped his wife and shot her in the chest with a 12-gauge shotgun, afterwards turning the gun on himself. Ms. Shipp staggered to the door, holding her entrails in her hands.

Ms. Shipp survived but required emergency surgery, rehabilitation, therapy and more surgery. Dalton survived as well, and was charged with aggravated rape, aggravated kidnaping, and attempted second degree murder. The WPSO took no disciplinary action against any deputy.

Ms. Shipp brought this § 1983 action against the Webster Parish Sheriff and deputies Steve Cropper and Betty Shipp, asserting due process, equal protection and state tort law claims. On the recommendation of the magistrate (App. A), the district court dismissed all federal claims except the equal protection claim and the failure to train claim under Fed.R.Civ.P 12(b)(6) (App. B), and ordered Ms. Shipp to file a

reply to the defendant deputies' assertion of qualified immunity. Ms. Shipp did so, alleging *inter alia*, overtly discriminatory statements by the Sheriff regarding women in domestic violence matters, Second Amended Complaint, ¶46A (App. C), and the magistrate recommended (App. D) and the district court found that she had pled with sufficient particularity (App. E) and denied defendants' motion to dismiss (App. F). The defendants appealed (App. G).

REASONS FOR GRANTING THE WRIT

I. MAY A CIRCUIT COURT DISREGARD "A CONSENSUS OF CASES OF PERSUASIVE AUTHORITY," *WILSON V. LAYNE*, 526 U.S. 603, 617 (1999), FROM OTHER CIRCUITS IN ASCERTAINING CLEARLY ESTABLISHED LAW FOR PURPOSES OF QUALIFIED IMMUNITY?

Ms. Shipp contends that the defendant law enforcement officers refused to protect her from domestic violence because she is a woman. Six circuits have recognized an equal protection claim for discriminatory failure to protect from domestic violence, five of them before the events of which Ms. Shipp complains: *Soto v. Flores*, 103 F.3d 1056, 1066 (1st Cir. 1997); *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994); *Hynson v. City of Chester*, 864 F.2d 1026 (3d Cir. 1988); *Ricketts v. City of Columbia*, 36 F.3d 775, 778 (8th Cir. 1994); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 701 (9th Cir. 1990); *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988). In addition, several district courts have recognized the claim. *See, e.g., McDonald v. City of Chicago*, No. 94 C 3623, 3624, 1994 WL 732865, at *3 (N.D. I11. Dec.23, 1994); *Hakken v. Washtenaw*, 901 F. Supp. 1245, 1251-53 (E.D. Mich. 1995). To plaintiff's knowledge, no circuit has rejected the

claim. Nevertheless, the circuit court held that Ms. Shipp had not asserted a clearly established right.

The circuit court granted qualified immunity because it refused to consider precedent from other circuits. 234 F.3d at 915. The court was aware of the unbroken line of cases from other circuits. But it ignored them because, "in determining whether a right is clearly established, we are confined to precedent from our circuit or the Supreme Court." *Id.* The Fifth Circuit had not yet had occasion to decide the precise question of whether a gender-based discrimination in the form of failure to protect victims of domestic violence violated the Equal Protection Clause.[1] Accordingly, it dismissed Ms. Shipp's claim. This tunnel-vision approach to ascertaining clearly established law conflicts with the approach of six other circuits, which consider decisions of sister jurisdictions. This Court should grant certiorari to resolve the conflict among the circuits.

This Court has never decided the parameters of "clearly established law" in the qualified immunity context, although it has suggested that the analysis is not confined to cases from the forum circuit. In *Procunier v. Navarette*, 434 U.S. 555, 565 (1978), the Court deferred the question by finding that the right asserted was not clearly established, "whether the state of the law is evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court." In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982), it again deferred the issue, citing *Procunier*. Recently, in *Wilson v. Layne*, 526 U.S. 603, 617 (1999), the Court indicated that the proper referent included cases both inside and outside the circuit in which the case arose. Finding qualified immunity in

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[1] The only Fifth Circuit case in which the issue arose was disposed of on summary judgment for lack of proof of disparate treatment. *McKee v. City of Rockwall*, 877 F.2d 409, 414-16 (5th Cir. 1989).

the case at bar, the Court observed:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the right on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were unlawful. *Id.*

In the absence of a Supreme Court decision, the majority of circuits do not limit themselves to their own precedents in ascertaining clearly established law. *See Varrone v. Bilotti*, 123 F.3d 75, 78 (2d Cir. 1997); *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988); *Burgess v. Lowery*, 201 F.3d 942, 944 (7th Cir. 2000) *cert. denied*, 121 S.Ct. 25(2000); *Norfleet v. Arkansas Dept. of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993); *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988); *Anaya v. Crossroads Managed Care Systems, Inc.*, 195 F.3d 584, 594 (10th Cir. 1999). These circuits vary in how much weight they give decisions from other jurisdictions. The Sixth Circuit will rely on decisions of other courts only in the extraordinary case, where those decisions "leave no doubt" of the illegality of the defendant's conduct, *Ohio Civil Serv. Employees Ass'n*, 995 F.2d at 1177, while the Ninth Circuit routinely charges government officials with knowledge of constitutional developments from all available decisional law, *Tribble*, 860 F.2d at 324. But none confines itself to the narrow restrictions adopted by the Fifth Circuit.

There are two problems with the Fifth Circuit's approach. First, it does not accurately indicate when a reasonable law enforcement officer would know that he is doing something unlawful. As Chief Judge Posner observed in *Burgess v. Lowery, supra*, there might be no prior decision in this Court or in the forum circuit "because the existence of the right was so clear ... that no one thought it worth while to

litigate the issue." *Id.* at 945. In other cases, a series of decisions by sister circuits would make the right clear in the forum, particularly if there were no contrary authority, as here.

Second, the Fifth Circuit's extreme approach tends to freeze the law.

> To rule that until the Supreme Court has spoken, no right of litigants in [the forum] circuit can be deemed established before [the forum has] decided the issue would discourage anyone from being the first to bring a damages suit in [the forum]; he would be certain to be unable to obtain any damages. *Id.*

As a result, the normal interchange by which differences among the circuits resolve themselves would be interrupted, and this Court would have to step in more frequently to unify the law.

To resolve a conflict among the circuits and to avoid the detrimental effects of the Fifth Circuit approach, this Court should grant certiorari and decide how clearly established law is to be determined in the qualified immunity analysis.

II. WAS IT CLEARLY ESTABLISHED IN 1996 THAT LAW ENFORCEMENT OFFICERS COULD NOT REFUSE TO PROTECT A WOMAN FROM DOMESTIC VIOLENCE BECAUSE OF HER GENDER?

Ms. Shipp complains of defendants' failure to respond to her domestic violence complaints because of "their discriminatory intent to treat female victims of domestic violence ... differently than similarly situated males." Second Amended Complaint, ¶38; *see also* ¶37 (App. C). That is a straightforward claim of discriminatory enforcement of the

laws, which this Court has recognized as violative of the Equal Protection Clause since *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886). In *Yick Wo*, the Court held that a municipality could not selectively enforce an ordinance prohibiting operation of a laundry in wood structures against persons of Chinese origins. Similarly here, the defendant deputies may not selectively deny protective services to women. Indeed, the law in that regard is so clearly established that this Court needed only to drop a footnote in *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 197 n.3 (1989), to remind that, although the State had no affirmative duty to protect, it could "not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."

Discriminatory provision of law enforcement protection from private violence has been at the core of the concerns underlying the Fourteenth Amendment since its inception. The floor debates of Reconstruction-era Congress are replete with denunciations of the unwillingness of state officials to protect the newly freed slaves from Ku Klux Klan violence. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 173-78 (1961)(quoting remark of Reps. Lowe, Beatty, Burchard, and Hoar), overruled on other grounds, *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Congress enacted the Civil Rights Act of 1871, now 42 U.S.C. §1983, to bring the force of the Equal Protection Clause to bear on the situation. *Id.* In light of this history, Ms. Shipp's challenge to the defendants' discriminatory refusal to protect her from her husband's violence is hardly novel.

Likewise, the impermissible nature of the invidious intent asserted by Ms. Shipp is long settled. Ms. Shipp claims discrimination on the basis of her sex. At least since *Reed v. Reed*, 404 U.S. 71 (1971), the law has been clearly established that women as a class are protected against discrimination, and that disparate treatment motivated by antipathy towards women or outdated gender stereotypes violate equal protection.

This is not a case alleging discrimination because of animus against domestic violence complaints. That would assert a new right. *See Hynson v. City of Chester*, 864 F.2d 1026, 1031 (3d Cir. 1988). This is a claim of discrimination because of gender. Proof of intent to discriminate against women is one element of the claim. 234 F.3d at 914. There is nothing novel about a claim of gender discrimination.

The circuit court decided to the contrary because, among other errors,[2] it required too specific a level of factual similarity in prior cases. By so doing, it upset the balance that this Court struck in *Anderson v. Creighton*, 483 U.S. 635 (1987), between the individual interest in vindication of constitutional rights, and the government official's interest in immunity. *Anderson*

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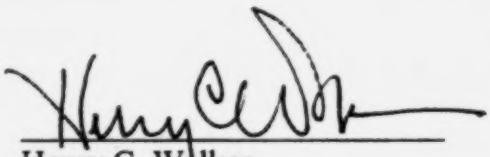
[2] The circuit court also misapplied the only Fifth Circuit decision to address a complaint of failure to respond to domestic violence complaints: *McKee v. City of Rockwall*, 877 F.2d 409 (5th Cir. 1989). (The *McKee* court granted summary judgment for the defendants because the plaintiff offered no evidence of disparate treatment.) In its initial opinion in *Shipp*, the circuit court correctly cited *McKee* as authority for a claim that "the non-arrest was the result of discrimination against a protected class." 199 F.3d at 262 (citing *McKee*, 877 F.2d at 414). That is the gravamen of Ms. Shipp's complaint. But on rehearing, the circuit court incorrectly cited *McKee* to establish lack of authority for Ms. Shipp's claim. 234 F.3d at 915. It did this by focusing on the question that *McKee* left open: whether a policy discriminating against domestic violence victims *per se* violates the Equal Protection Clause. 234 F.3d at 912 (citing *McKee*, 877 F.2d at 416). That question is not presented by this case. Intent to discriminate against women is an independent element of Ms. Shipp's claim, which she will prove by refusal to respond to domestic violence complaints by women *and other evidence*.

requires a level of factual specificity sufficient to determine whether a reasonable government official would know that his conduct is unlawful. It is not enough to ask whether the unlawfulness of violating the equal protection clause is clearly established, because the answer would always be "yes." *Id.* at 639-40. Conversely, a requirement of precedent with identical facts would eviscerate constitutional protections because it would rarely, if ever, be satisfied. *See Id.* This Court's precedents have long established that a law enforcement officer could not deny protective services on the basis of a minority status such as race or gender. That is sufficient for a reasonable deputy to know that refusal to respond to domestic violence complaints because the victim was a woman is unlawful. *Anderson* requires no more, and the circuit court erred in holding that it did. This Court should grant certiorari to restore the correct balance between official immunity and vindication of constitutional rights, and to reaffirm one of the principal purposes of the Equal Protection Clause.

CONCLUSION

For the reasons set forth above, plaintiff Cherie Shipp requests that a writ of certiorari issue.



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CHERIE SHIPP, ET AL	**NUMBER: 97-0308**
VERSUS	**JUDGE WALTER**
ROYCE L. MCMAHON, ET AL.	**MAG JUDGE PAYNE**

REPORT AND RECOMMENDATION

(Entered January 6, 1998)

Before the court is the Motion to Dismiss filed on behalf of all defendants pursuant to F.R.C.P. 12(b)(6) (Docket No. 14). To analyze the motion it is necessary to review the well-pleaded factual allegations of the complaint, which must be accepted as true and construed in a light most favorable to plaintiff. Green v. State Bar of Texas, 27 F.3d 1083, 1086 (5th Cir. 1994).

SUMMARY OF THE COMPLAINT

Cherie Shipp fled from her abusive husband, Dalton, and moved into her sister's house near Minden. Dalton, when he learned of Cherie's whereabouts, made several threatening phone calls to her, which she reported to deputies of the Webster Parish Sheriff. Dalton also drove slowly by the sister's house several times, which Cherie reported to defendant Steve Cropper, a Webster Parish deputy. Cropper advised that he would do nothing about Dalton.

Cherie then moved to the home of a cousin in the Webster Parish town of Dubberly. Dalton invaded the

cousin's home and attacked Cherie, beat her with a telephone that he ripped from a wall, and struck her with his fist. He warned her not to report the incident to law enforcement or she would "find herself in the hospital". Dalton left in Cherie's automobile, which contained items belonging to Cherie and her cousin. Cherie, despite Dalton's warning, called the Webster Parish Sheriff's office ("WPSO"). Deputy Cropper came to the scene and took a report, but made no immediate effort to arrest Dalton.

Several days later Deputy Cropper met with Dalton and asked him to return the items from the automobile, but did not arrest him . Dalton was later allowed to turn himself in to be charged with simple criminal damage to property and simple battery, both misdemeanor offenses. He appeared in court eight days later to respond to the charges. As a condition of bail, the court ordered him to stay away from Cherie. Dalton returned to court later that day, pled guilty to both offenses, and was ordered to immediately seek counseling. Sentencing was set for a later date.

Cherie next obtained a temporary restraining order ("TRO") from the state district court in Webster Parish that prohibited Dalton from harassing or abusing Cherie or having any contact with her. After Deputy Cropper served Dalton with the TRO, Dalton made several abusive and threatening phone calls to Cherie, which she reported to the WPSO. She was told that nothing could be done. Dalton was not arrested despite his violations of both the TRO and his bail obligations.

Dalton did not appear for sentencing on the criminal charges and a bench warrant was issued. Despite the fact that Dalton later appeared to face other criminal charges at the e Webster Parish Courthouse, deputies failed or refused to

arrest him on the bench warrant at those times.

Approximately four months after the scheduled sentencing, Dalton tracked Cherie to the home of another sister. He talked her out of the home and into his car, purportedly to talk. Once Cherie was in the car, however, Dalton started the car arid sped away with Cherie's legs dragging the ground. She attempted to jump out but he grabbed her by the hair and held her in the car. He drove her to a house that he leased in Webster Parish.

Cherie's sister telephoned her mother, Carolyn Gates, who immediately telephoned the WPSO and reported a kidnaping. The dispatcher that received Ms. Gates' call was defendant Betty Shipp.[1] Upon receiving the call, Betty Shipp hung up the telephone with no inquiry of any kind as to details or particulars. She did advise Deputy Cropper, who was present when the call came in. He chose to take no action, notwithstanding his knowledge of Dalton's propensity for violence. Neither deputies Cropper nor Shipp dispatched a radio transmission to alert other deputies of the complaint.

Carolyn Gates, upon having her call to the WPSO terminated by Betty Shipp, phoned the Minden Police Department, which dispatched an emergency alert and radioed the WPSO. Ms. Gates immediately picked up Jerry Gates and they drove to the Webster Parish Courthouse where they observed Deputy Cropper standing idly outside. Cropper advised Mr. Gates that he intended to do nothing to apprehend Dalton. Mr. Gates told Cropper where he believed Dalton might be headed with Cherie. Cropper disagreed,

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[1] The complaint does not state whether Betty Shipp is related to Dalton Shipp.

correctly guessing that Dalton was going to the leased house. Mr. Gates, denouncing the deputy's unwillingness to act, told them that he was going to the leased house and left with Mrs. Gates, Deputy Cropper and another deputy pursued Mr. Gates.

Four deputies and Mr. and Mrs. Gates eventually arrived at the house. When the deputies made no effort to enter the house, Mr. Gates tried to approach but was restrained. Deputy Cropper then went to the door and knocked, telling the others that he had to determine whether Cherie was with Dalton voluntarily. He got no response from inside the home.

Mr. Gates then observed the silhouette on a curtain of what he believed to an armed Dalton. Mr. Gates again began to approach the house but a deputy ordered him to stay back. A shot then rang out from inside the house and the deputies dashed for their cars and put on armored vests. Shortly thereafter, another gunshot rang out from inside. The deputies remained crouched behind their cars.

Meanwhile, inside the house, Dalton had raped Cherie. After shooting Cherie in the chest with a 12-gauge shotgun, he shot himself. Cherie eventually staggered to the door but could not open it and screamed for help. The deputies made no move. Cherie eventually staggered out through a side door, holding her exposed entrails in her hand.

As Cherie emerged from the house, Carolyn Gates and Deputy Hortman (not a defendant) raced to her aid. Mr. Gates also dashed toward his daughter, but was "waylaid by defendant Steve Cropper, who would have pistol-whipped him but for the intervention of Carolyn Gates." At Cropper's order, another deputy handcuffed Mr. Gates and removed him

from the scene.

Cherie was transported to the hospital, where emergency procedures saved her life. She remained hospitalized for several weeks, followed by rehabilitation and therapy. She has required further surgery, including skin grafts and efforts to repair complications from the original surgery.

Dalton recovered from his wound and awaits prosecution on charges of aggravated rape, aggravated kidnaping, and attempted second degree murder. He is detained in the Webster Parish jail but has been permitted on several occasions to leave the jail and roam relatively unfettered around Webster Parish, and even as far away as Caddo Parish.

Between the time of the kidnaping/shooting and the filing of this lawsuit, Sheriff McMahon's term in office expired and he was replaced by Sheriff Riser. Sheriff Riser was apprised of the events described above, but has imposed no discipline on any deputy and has taken no steps to require the deputies to follow the law with regard to domestic violence cases.

CHERIE'S DUE PROCESS CLAIM

The Effect of DeShaney

The defendants' motion relies primarily on DeShaney v. Winnebago County Dept. of Social Services, 489 U.9. 189, 109 S.Ct. 998 (1989). Despite overwhelming evidence of child abuse that came to light during an approximate two-year period, social services authorities continued to allow Joshua DeShaney's father to maintain custody of Joshua.

Eventually, Joshua's father beat him so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by injuries to the head inflicted over a long period of time. Joshua's brain damage was so severe that he was expected to spend his life confined to an institution for the profoundly retarded. Joshua and his mother sued the various county authorities involved and alleged that they deprived Joshua of his liberty without due process of law, in violation of the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence of which they knew or should have known.

In reviewing the case, the Supreme Court first noted that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." Id., 109 S.Ct. at 1003. It forbids the state itself to deprive individuals of protected interests without due process, but its language does not impose "an affirmative obligation on the State to ensure that those interests do not come to harm through other means." Id. The court affirmed summary judgment for the defendants, stating:

> As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Id., 109 S.Ct. at 1004. Thus, DeShaney appears to defeat Cherie's claim that the defendants violated her due process rights by failing to protect her from private violence committed by Dalton.

Custodial Relationship Exception

Cherie argues that her claims are subject to a "custodial relationship" exception to DeShaney. She admits that she was neither involuntarily confined nor incarcerated by the defendants, but argues that she was effectively within the custody of the State by virtue of the state court TRO and the bail conditions imposed upon Dalton. She contends that by issuing the court orders, the state agreed to take responsibility for leer safety and "affirmatively undertook to protect her." Opposition, p. 7. She further contends that the orders prohibiting contact by Dalton "effectively fenced boundaries within which the State warranted Ms. Shipp that she would be safe, creating an enclosure comparable to 'custody'." Id. These arguments do not place Cherie's claims within the scope of the very limited custodial exception.

In DeShaney, the court recognized that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect, to particular individuals." Id. 109 S.Ct. at 1004. The only examples recognized by the court were incarcerated prisoners, involuntarily committed mental patients and suspects in police custody that are in need of medical care due to injuries incurred while being apprehended. The court explained that the rationale behind extending due process protections to such persons was that the State had affirmatively exercised its power to so restrain the individual's liberty that the person was unable to care for himself. "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed can his freedom to act on his own behalf." Id. 109 S.Ct. at 1005-6.

In applying DeShaney, the Fifth Circuit has held that the type of "special relationship" that entitles a citizen to enjoy a clearly established constitutional right to state protection from known threats of harm by private actors "only arises when a person is involuntarily confined or otherwise restrained against his will pursuant to a governmental order or by the affirmative exercise of state power." Walton v. Alexander, 44 F.3d 1297, 1299 (5th Cir. 1995) (*en banc*)(failure of superintendent of residential institution for the deaf to protect student from molestation by classmate did not violate Due Process Clause) "[O]therwise, the state has no duty arising under the Constitution to protect its citizens against harm by private actors." Id. at 1304; See also, Doe v. Hillsboro Independent School District, 113 F.3d 1412, 1415 (5th Cir. 1997) (*en banc*) (compulsory school attendance laws do not create the custodial relationship envisioned by DeShaney because they "are not analogous to the restraints of prisons and mental institutions.").

Cherie has not alleged that the defendants imposed any limitation on *her* freedom to act. The fact that a state court may have imposed limitations upon *Dalton*, and that Cherie felt a resulting degree of protection, is insufficient to state a claim under the "custodial" or "special relationship" exception to DeShaney.

State Created Danger Exception

A similar but separate exception to DeShaney is the "state created danger" theory. Cherie argues that she is entitled to relief under this theory because the court orders of protection made her feel protected, but actually served only to enrage Dalton. See Opposition, p.8. That, however, is argument in a brief and not contained in the allegations of the complaint, which are the focus of a motion to dismiss. Even

assuming that plaintiff were to amend her complaint to add such allegations, they would not defeat the motion on this issue.

The Fifth Circuit has yet to adopt or reject the state created danger theory. Thus far, the court has decided all cases in which the theory has been pleaded by holding that the facts did not support a claim even if the theory were adopted. See Doe, 113 F.3d at 1415 (facts did not trigger a duty, "even if we were to adopt such a theory"), Johnson v. Dallas Independent Schiool District, 38 F.3d 198, 201 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017, 115 S.Ct. 1361 (1995) (even if the theory is constitutionally sound, the pleadings in the case fell short of the "demanding standard" for liability) and Randolph v. Cervantes, 1997 W.L. 751302 (5th Cir. 1997).

If the theory is constitutionally permissible, to find liability "[t]he environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." Doe, 113 F.3d at 1415. The plaintiff in Doe, a school girl, alleged that the school district placed her in tree same area as a custodian who had a known criminal record, with teachers in the same building but not in the immediate area. She was raped by the custodian. The court held that those facts did not trigger a duty under the state created danger theory. In Johnson, a student was shot and killed by a non-student who was permitted to enter the high school campus without wearing a required ID badge, and whose concealed handgun was not discovered because the school was not using its metal detectors. Those facts also failed to state a claim under the theory.

The defendants in this case are not alleged to have created any dangerous environment. A restraining order issued by a judge, who is not a defendant, is insufficient to satisfy this element. There are also insufficient allegations to satisfy the requirement that the defendants have used their authority to create an opportunity for Dalton that would not otherwise have existed. The defendants did not restrain Cherie or otherwise make her vulnerable to an attack by Dalton that he could not have otherwise committed. These facts are nothing like those of the several cases from other circuits, cited in Doe and Johnson, in which these elements were satisfied. See, e.g., Wood v. Osterander, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341 (1990) (police arrested drunk driver and left his female passenger alone on the street in a high crime neighborhood, where she was raped) and Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066, 110 S.Ct. 1784 (1990) (state placed prisoner with a violent criminal history in a work program at town hall under supervision of untrained employee; prisoner abducted a city employee and held her hostage for three days).

The Fourth Circuit recently conducted an exhaustive analysis of the state created danger theory in Pinder vs Johnson, 54 F.3d 1169 (4th Cir. 1995) (*en banc*), *cert. denied*, U. S. , 116 S.Ct. 530 (1995), a case with facts at least as tragic as these. Plaintiff was attacked by her former boyfriend, whom police arrested. A policeman, aware of the boyfriend's propensity for violence and criminal record for attempted arson of plaintiff's residence, assured plaintiff that the boyfriend would be locked up overnight. The boyfriend was released that evening and returned to plaintiff's house and set fire to it. Plaintiff's three children died in the fire. Despite the affirmative assurances of the defendant, the court found that no clearly established constitutional right had been

violated. The defendant's affirmative assurances, which granted at least as much comfort as the TRO and the bail conditions did in this case, were held insufficient to create or enhance the danger. Cherie's claims also fail to satisfy the demanding standards of the theory, assuming its existence.[2]

CHERIE'S EQUAL PROTECTION CLAIM

Cherie complains that the acts of the defendant deputies violated her rights under the Equal Protection Clause. She also alleges that the defendant sheriffs inadequately trained their deputies with respect to domestic violence complaints, and had a policy or custom of providing less protections to victims of domestic assault than to other assault victims, in violation of the Equal Protection Clause.

DeShaney held that if the Due Process Clause does not require the state to provide citizens with particular protective services, it follows that the state cannot be liable under that clause for injuries that could have been averted had it chosen to provide the services. Id. 109 S.Ct. at 1003-04. The Court dropped a footnote at this point to state that: "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."

The Fifth Circuit has only once addressed the effect of footnote 3. In McKee v. City of Rockwall, 877 F,2d 409 (5th

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[2] The allegations that defendants have allowed Dalton to leave the jail, despite his failure to make bond, might support a claim under this theory. However, the complaint does not allege that Dalton has caused any harm during such releases.

Cir. 1989), *cert. denied*, 493 U.S. 1023, 110 S.Ct. 727 (1990), the plaintiff called police to her apartment on a domestic assault complaint. Police made no arrest. After they left, the attacker slashed plaintiff in the leg with a knife. She contended that police acted pursuant to a discriminatory policy against making arrests in domestic assault cases, in violation of the Equal Protection Clause. The court held that summary judgment for the police was appropriate because there was a complete failure of proof with respect to the allegation of differential treatment of victims of domestic violence.

Because Mckee was resolved by a failure of proof to defeat summary judgment, rather than a motion to dismiss, its result is of no moment here. Worth noting, though, is the following statement by the court:

> In particular, we do not decide whether, had McKee created a fact issue as to the existence of a policy discriminating against victims of domestic violence, that policy would constitute intentional discrimination against women under the rule of Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976), or whether that policy would discriminate against a protected minority within the meaning of DeShaney's footnote 3.

Id. at 416. The Fifth Circuit has apparently never returned to these issues. Other circuits, however, have frequently found that women in such circumstances could state an Equal Protection claim. See Soto v. Flores, 103 F.3d 1056, 1065-66 (1st Cir. 1997), *cert. denied*, __ U.S. __, 118 S.Ct. 71 (1997); Navarro v. Block, 72 F.3d 712, 715-17 (9th Cir. 1995); Ricketts v. City of Columbia, 36 F. 3d 775, 780 (8th Cir. 1994), *cert. denied*, 514 U.S,. 1103, 115 S.Ct. 1838 (1995);

Watson v. City of Kansas City, 857 F.2d 690, 694 (10th Cir. 1988); Hynson v. City of Chester, 864 F.2d 1026, 1031 (3d Cir. 1988); Balistreri v. Pacifica Police Dept., 901 F.2d 696, 700 (9th Cir. 1990). The court finds that Cherie has alleged sufficient facts to state a claim against deputies Steve Cropper and Betty Shipp for violating her rights under the Equal Protection Clause. See also, Johnson v. Morel, 876 F.2d 477, 479 (5th Cir. 1989) (*en banc*) (harassment of minority by police stated Equal Protection Clause against policemen).[3]

To state a claim against Sheriff McMahon, Cherie must plead that there was a policy or custom of his office to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that plaintiff was injured by the policy or custom. Soto, 103 F.3d at 1066. The allegations in hair complaint are sufficient.

As for Sheriff Riser, he is not alleged to have been in office at the time of these events. Plaintiff alleges that Riser is nonetheless liable because he has adopted and perpetuated McMahon's policies (Complaint, paragraph 41) and because he has permitted Dalton, who is jailed and awaiting trial, to wander through Webster Parish and surrounding areas (paragraph 35). Cherie conclusorily alleges that Riser's adoption of the policies damaged her and her father. She fails, however, to articulate any specific facts to support the damage claim. There is no contention that Dalton has

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[3] Johnson was later overruled with respect to its significant injury requirement for an excessive force claim. See Harper v. Harris County, 21 F. 3d 597,(5th Cir. 1994). Its statements on equal protection remain precedent.

harmed Cherie during Riser's tenure. Further, there are no specific allegations of fact that defendant Riser has committed any act that damaged Cherie or her father. Accordingly, all claims against Sheriff Riser should be dismissed.

FAILURE TO TRAIN

Cherie alleges in paragraphs 43 and 44 of heir complaint that inadequate training of the deputies by Sheriff McMahen with respect to domestic violence was tantamount to a policy of lesser protection for domestic violence victims, and showed a deliberate indifference to the disproportionate impact that such a policy has on women. "[T]he inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 1204 (1989). Only where the failure to train reflects a deliberate or conscious choice that rises to the level of a policy can the Sheriff be held liable under § 1983 for failure to train his deputy. Id. 109 S.Ct. at 1205. See also Doe v. Taylor Independent School District, 15 F.3d 443, 452-54 (5th Cir. 1994) (*en banc*) *cert. denied*, 513 U.S. 815, 115 S.Ct. 70 (1994) (discussing supervisor liability for §1983 violations) and Flores v. Cameron County, 92 F.3d 258, 270-71 (5th Cir. 1996)(upholding form of failure to train jury instruction). Cherie's allegations are sufficient, under this jurisprudence, to survive a Rule 12 (b) (6) challenge.

PROCEDURAL DUE PROCESS

Cherie argues that the state court orders created a property interest in police enforcement, of which the defendants deprived her without procedural due process.

Footnote 2 of DeShaney mentions that Joshua argued an entitlement to protective services based on state statutes that warranted due process protection under Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972), but the argument was not addressed because it had not been raised below. Other plaintiffs have raised the issue and skirted DeShaney by establishing that a statute or court order had sufficiently mandatory language to establish a "legitimate claim of entitlement" as required by Roth. See Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990), *cert. denied*, 498 U.S. 867, 111 S.Ct. 182 (1990) (state statutes provided that the defendant "shall be responsible" for providing services) and Coffman v. Wilson Police Dept., 739 F.Supp. 257, 264 (E.D. Pa. 1990). The plaintiff in Coffman was a domestic abuse victim who had been the beneficiary of a court issued protective order. The order was issued to the police department and stated that the department "shall" enforce the orders. That mandatory language was held sufficient to establish a property interest under Roth.

The complaint in this case neither attaches a copy of any of the orders nor quotes any language from them. In the absence of an allegation that the order contained the type of mandatory language that some courts have held creates a property interest, the court need not address this issue further. No opinion is expressed as to whether this court would recognize such a claim if properly pleaded.

QUALIFIED IMMUNITY

Defendants argue that they are entitled to qualified immunity from the §1983 claims. Plaintiff has the burden to rebut the defense by establishing (1) that the allegedly wrongful conduct violates a clearly established constitutional right under the current state of the law and (2) whether the

conduct was "objectively reasonable" measured under the law as clearly established at the time of the challenged conduct. Meadowbriar Home for Children, Inc. v Gunn, 81 F.3d 521, 530 (5th Cir. 1996). The law was clearly established, in the form of circuit court jurisprudence, several years before these events occurred that domestic abuse victims that alleged facts such as these stated an Equal Protection claim against police. See cases cited in Equal Protection analysis, above. Because the law was clearly established with respect to the Equal Protection claim at the time of these events and the alleged conduct was objectively unreasonable under those standards, the defendants are not entitled to qualified immunity.

CHERIE'S STATE LAW CLAIMS

The same facts alleged by Cherie that support a Constitutional claim would presumably state a claim for recovery by Cherie under one or more state law theories. Because it has been recommended that the motion be denied because of Equal Protection claim, it is unnecessary to go further and separately analyze all of the various state law claims that might be available. Also, "labels of specific torts and strictures attached thereto do not always coincide with Louisiana's broad and more flexible notion of fault under . . . Civil Code article [2315]." White v. Monsanto Co., 585 So.2d 1205, 1209 (La. 1991). As the case progresses, the court may use means other than Rule 12, such as Rule 56 and the pretrial order, to eliminate redundant or inappropriate theories of tort law recovery. Also, if the federal claims cannot survive the motion for summary judgment that will almost certainly be filed, the court may elect under 28 U.S.C. §1367 to dismiss the state law claims without prejudice and avoid the necessity of addressing them on the merits.

JERRY GATES

In response to the motion, Jerry Gates points to his allegations in paragraph 30 of the complaint that after Cherie was shot and staggered outside the house, Mr. Gates attempted to run to his daughter:

> "but was waylaid by defendant Steve Cropper, who would have pistol-whipped him but for the intervention of Carolyn Gates. As it was, Cropper ordered Deputy Reynolds to handcuff Mr. Gates and to remove him. Reynolds did as he was ordered."

To state a Fourth Amendment claim for excessive force, a plaintiff must allege (1) an injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable. Ikerd v. Blair, 101 F.3d 430, 433-34 (5th Cir. 1996). The vague allegation that someone has been "waylaid" does not adequately plead facts to state an excessive force claim. Also, the allegation that Cropper "would have" pistol-whipped Gates affords no relief. *Actual* pistol-whipping might merit a different result. As for the handcuffing of Mr. Gates, it was a Fourth Amendment seizure but there are insufficient facts alleged to make out a claim that it was an unreasonable one. See Schultea v. Woods, 47 F.3d 1432 (5th Cir. 1995) (*en banc*) (heightened pleading standard applies to §1983 claims against individual defendants)

Mr. Gates' reliance upon Ross v. U.S., 910 F.2d 1422 (7th Cir. 1990) for a claim based on the deputies preventing his rescue attempts is misplaced. The plaintiff-mother in Ross alleged that her son drowned because of the county's policy of stopping private attempts to rescue drowning

victims, even where the county refused to make a rescue. The mother was not the person who attempted the thwarted rescue. It is apparent from the opinion that only the victim (or his survivor), not the person who would have liked to make the rescue, can look to Ross for a claim. In this case, Cherie is still alive to bring her own claim.

Mr. Gates argues that he that he has pleaded state law causes of action under the state constitution, La.Civ.Code arts. 2315 and 2315.6. Opposition, p. 21. Article 2315.6 does allow recovery of mental anguish damages suffered by certain persons who witness an event that injures a relative. Mr. Gates alleges sufficient facts to survive a motion to dismiss this claim. As with Cherie's state law claims, the denial of the motion on one ground precludes the need for an exhaustive analysis of the various other tort theories that might apply.

Accordingly;

IT IS RECOMMENDED that the Motion to Dismiss be **GRANTED IN PART** as follows: (1) That all of Cherie Shipp's alleged federal constitutional claims, **with the exceptions** of the Equal Protection claim and the related failure to train claim, be **DISMISSED WITH PREJUDICE**; (2) that all federal claims by plaintiff Jerry Gates be **DISMISSED WITH PREJUDICE**; and (3) that all claims against Sheriff Theodore L. Riser be dismissed with prejudice; and (4) that the motion be **DENIED** in all other respects.

Objections

Under the provisions of 28 U.S.C. §636(b)(1)(C) and Fed.R.Civ. P. 72(b), parties aggrieved by this

recommendation have ten (10) business days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed.R.Civ.P. 6(b). A party may respond to another party's objections within ten (10) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 10 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. See Douglass v. U.S.A.A, 79 F.3d 1415 (5th Cir. 1996) (*en banc*).

THUS DONE AND SIGNED at Shreveport, Louisiana, this 5th day of January 1997.

/s/ Roy S. Payne
ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CHERIE SHIPP, ET AL	**NUMBER: 97-0308**
VERSUS	**JUDGE WALTER**
ROYCE L. MCMAHON, ET AL.	**MAG JUDGE PAYNE**

MEMORANDUM RULING AND ORDER
(Entered March 26, 1998)

Before the court is the Magistrate's Report and Recommendation ("R & R") that the Motion to Dismiss [Docket No. 14] filed on behalf of all the defendants pursuant to Federal Rule of Civil Procedure 12(b)(6) be granted in part and denied in part. In light of the written objections filed by both plaintiffs and defendants, the court separately addresses the parties' contentions in this Memorandum Ruling.

I. Summary of the Complaint

Plaintiffs object to the Magistrate's "Summary of the Complaint" since all details of the complaint are not included in the R & R. The Magistrate's summary is what it purports to be, only a summary. It is clear that the Magistrate considered the complaint in its entirety. This court has thoroughly reviewed the record, considering both the plaintiffs' Complaint and Amended Complaint.

II. Substantive Due Process Claim

A. Special Relationship

In DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 197, 109 S.Ct. 998, 1004 (1989), the Supreme Court generally concluded that under the substantive component of the due process clause, a state's failure to protect an individual from violence committed by a private actor did not violate due process. However, a "special relationship" may impose an affirmative duty on the state – the court provided examples of an incarcerated prisoner and involuntarily committed mental patient. 489 U.S. at 198-99, 109 S.Ct. at 1004-05. The court stated:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.
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> 489 U.S. at 200, 109 S.Ct. at 1005-06.

Plaintiffs object that the circumstances of this case create a "similar restraint of personal liberty." 489 U.S. at 200, 109 S.Ct. at 1006. The court is constrained to find that Cherie Shipp cannot meet the standard for a "special relationship" creating a state duty to protect. Cherie Shipp neither lost the ability to protect herself, nor was her physical liberty restrained – she was not "involuntarily confined against [her] will through the affirmative exercise of state power." See Walton v. Alexander, 44 F.3d 1297, 1306 (5th Cir. 1995) (*en banc*). This court concurs with the findings of the Magistrate under the applicable Fifth Circuit law on this issue.

B. State-Created Danger Exception

The Fifth Circuit recently explained:

> To prevail under the state-created danger theory, the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. The key to the state-created danger cases ... lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid.

Randolph v. Cervantes, 130 F.3d 727, 731 (5th Cir. 1997), quoting Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017, 115 S.Ct. 1361 (1995). Johnson further states, "[p]ut otherwise, the defendants must have been at least deliberately indifferent to the plight of the plaintiff." 38 F.3d at 201.

The complaint states that the defendants were aware of the danger Dalton, Cherie Shipp's husband, posed to her. Cherie Shipp complains that the defendants' inaction gave Dalton a "green light" for his actions and created an enhanced danger for her. Cherie Shipp cannot establish the third element of the state-created danger theory. She was not placed "in a dangerous environment stripped of means to defend [herself] and cut off from sources of aid;" nor did defendants place her "in a `unique, confrontational encounter' with a violent criminal." 38 F.3d at 202. She was free to act and the complaint states that she voluntarily went outside of her sister's apartment to talk with Dalton and sat in his vehicle – this conduct gave Dalton the opportunity to kidnap her and inflict

injury.[4] The court agrees with the Magistrate's analysis on this issue.

Plaintiffs' complaint also states that while awaiting trial, Dalton was being held in the Webster Parish Jail as he failed to make bond. Plaintiffs allege that Sheriff Riser has allowed Dalton out of jail, as Dalton has been seen in public places dressed in plain clothes and free of handcuffs. In footnote 2 of the R & R, the Magistrate states:

> The allegations that defendants have allowed Dalton to leave the jail, despite his failure to make bond, might support a claim under this theory. However, the complaint does not allege that Dalton has caused any harm during such releases.

In her amended complaint, Cherie Shipp claims emotional distress but alleges no physical harm or threats of harm made to her as a result of Dalton's release.[5]

Plaintiffs appear to allege a due process right to be free from emotional distress. Shinn v. College Station Indep. Sch. Dist., 96 F.3d 783, 786 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1695 (1997), states that "[t]here is no constitutional right to be free from emotional distress." This statement is based on the premise that § 1983 "imposes liability for violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law." Id., quoting Baker v. McCollan, 443 U.S. 137, 146, 99 S.Ct. 2689, 2695 (1979). All federal claims

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[4] See Complaint, ¶¶15 - 16

[5] See Amended Complaint, ¶ 35A.

against Sheriff Riser should be dismissed as the plaintiffs only allege emotional distress.

Accordingly, Cherie Shipp is left with an emotional distress claim under state tort law. To maintain an action for intentional infliction of emotional distress, the plaintiff must establish: (1) the defendant's conduct was extreme and outrageous; (2) the plaintiff suffered severe emotional distress; and (3) the defendant knew or should have known that emotional distress would result from his conduct. White v. Monsanto Co., 585 So.2d 1205, 1209 (La. 1991). Louisiana also has a cause of action for negligent infliction of emotional distress with recovery limited to cases having an "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." Moresi v. Dept. of Wildlife and Fisheries, 567 So.2d 1081, 1096 (La. 1990); *see also* Barrino v. E.B.R.P. Sch. Bd., 697 So.2d 27, 33-34 (La. App. 1 Cir. 6/20/97). The complaint sufficiently states these state law causes of action. The court will exercise supplemental jurisdiction over plaintiffs' state law claims against Sheriff Riser.

II. Procedural Due Process Claim

The R&R does not address Cherie Shipp's procedural due process claim as the language of the court orders alleged to have created a property interest in police enforcement was not in the original complaint. Plaintiffs have amended paragraph 40 of their complaint and attach copies of the court orders.

Cherie Shipp claims a property interest in police enforcement under Coffman v. Wilson Police Dept., 739 F.Supp. 257 (E.D. Pa. 1990). Coffman held that although Pennsylvania's Protection From Abuse Act did not create a

property interest, a court protective order under the statute may create a property right cognizable under Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972), *i.e.*, "the right to reasonable police response." Coffman, 739 F.Supp. at 264. The protective order in Coffman stated that the police department "shall" enforce the order. Id. Also, the temporary order in Coffman was made final.

The Amended Complaint contends that Louisiana law mandated Dalton's arrest for violating the restraining order. U nlike Coffman, Cherie Shipp's temporary restraining order directs the actions of Dalton and not the police – the order does not state that the police "shall" enforce the order. Also, it is not alleged that the temporary restraining order became permanent.

Furthermore, Louisiana's Domestic Abuse Assistance Act has bean interpreted not to mandate arrest for violations of restraining orders in Ardoin v. City of Mamou, 685 So.2d 294, 299 (La. App. 3 Cir. 11/20/96). The Ardoin court found that although the Domestic Abuse Assistance Act and La. R.S. 14:79 (Violation of Protective Orders) authorize arrest, "such authorization must be subject to the discretionary powers of law enforcement officers on the scene." Id. at 297. La. R.S. 14:79(E) states: "Law enforcement officers shall use every reasonable means, including but not limited to immediate arrest of the violator, to enforce a . . . temporary restraining order." La. R.S. 46:2140 states: "Whenever a law enforcement officer has reason to believe that a family or household member has been abused, the officer shall immediately use all reasonable means to prevent further abuse" including arrest. Ardoin finds that officers are only instructed to "use all reasonable means." Id. Arrest is not mandated by the statutes, thus, they do not create a property right.

Also, the temporary restraining order is void of

mandatory language requiring its enforcement, thus, there is no property right as established in Coffman. Cherie Shipp also claims that a bench warrant with mandatory enforcement language gives her a property right.[6] Plaintiffs cite no authority for this premise and the court finds that the bench warrant does not establish a property right in favor of Cherie Shipp.

III. Equal Protection Claim

Although the Supreme Court found no due process violation in DeShaney, the Court stated: "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." 489 U.S. at 197, 109 S.Ct. at 1004, n. 3. Defendants object to an equal protection claim based on the Fifth Circuit opinion McKee v. City of Rockwall, Texas, 877 F.2d 409 (5th Cir. 1989), *cert. denied*, 493 U.S. 1023, 110 S.Ct. 727 (1990). In McKee, the court dismissed the plaintiff's equal protection claim because plaintiff failed to provide sufficient summary judgment evidence of discrimination. McKee did not address whether a policy of discrimination against victims of domestic violence, if established, would constitute intentional discrimination against women. 877 F.2d at 416.

Defendants submit that the law is not clearly established that such a policy would violate equal protection law, thus, the individual officers are qualifiedly immune. The court finds that such conduct pursuant to a discriminatory policy violates clearly established law; the court concurs with the findings of the Magistrate on this issue.

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[6] The bench warrant states to the Sheriff of Webster Parish; "you are hereby commanded to arrest said DALTON D. SHIPP, III." *See* Docket No. 31.

Defendants further contend that "[t]here is not any clearly established law that requires immediate reaction by one law enforcement agency to an alleged criminal complaint that occurs within another law enforcement agency's jurisdiction."[7] To the contrary, the Attorney General of Louisiana has opined that "where a complaint of crime or offense within a municipality is made with the sheriff's office, the sheriff may either exercise concurrent jurisdiction with the city police and handle the complaint or he may refer the complaint to the city police." A.G. Opinion 93-6 (1/13/93).

Finally, Defendants argue that Deputies Cropper and Shipp should be dismissed under the qualified immunity doctrine for failure to plead with particularity, as conclusions alone are insufficient. When a plaintiff sues a public official under § 1983, a district court must insist on heightened pleading by the plaintiff. Morin v. Caire, 77 F.3d 116, 121 (5th Cir. 1996). Plaintiffs' complaint states, with particularity, that both Deputies Cropper and Shipp ignored requests to help Cherie.[8] However, the complaint more conclusively states that their ignoring or inaction is based on discrimination against domestic violence victims. There are no specific allegations that Deputies Cropper and Shipp refused to act due to a discriminatory intent.

In Shultea v. Wood, 47 F.3d 1427 (5th Cir. 1995) (*en banc*), the Fifth Circuit announced a new approach for the particularity requirement of pleading in a § 1983 case:

> First, the district court must insist that a plaintiff suing a public official under § 1983 file a short and plain

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[7] *See* Defendants Objections to R & R, p.6.

[8] *See* Complaint, ¶¶ 8-9, 18-21, 23, & 29.

> statement of his complaint, a statement that rests on more than conclusions alone. Second, the court may, in its discretion, insist that a plaintiff file a reply tailored to an answer pleading the defense of qualified immunity. Vindicating the immunity doctrine will ordinarily require such a reply, and a district court's discretion not to do so is narrow indeed when greater detail might assist.

47 F.3d at 1433-34; Morin, 77 F.3d at 121 ("In spite of these factual shortcomings, the district court failed to order the plaintiff to file either a statement of facts, or a reply to the defendants' assertion of qualified immunity. This is clear error"). Accordingly, the plaintiffs are ordered to file a reply to Deputies Cropper and Shipp's defense of qualified immunity under the heightened pleading standard.

The court will exercise supplemental jurisdiction over Cherie Shipp's state law claims against the deputies. Plaintiffs' allegations against Sheriff McMahon are sufficient as found in the R&R.

IV. Failure to Train

This court concurs with the findings of the Magistrate that Cherie Shipp's allegations are sufficient to overcome the motion to dismiss.

VI. Jerry Gates

The R & R correctly denies Jerry Gates' Fourteenth Amendment claim for thwarted rescue and Fourth Amendment claim for excessive force. Without a constitutional violation, the failure to train claim should likewise be dismissed.

In his objections to the R & R, Jerry Gates contends that he has an independent cause of action under § 1983 for his own injuries resulting from the deprivation of Cherie Shipp's constitutional rights since he can pursue recovery under Louisiana's bystander law, La. C.C. Art. 2315.6. The Fifth Circuit has denied a similar claim under Texas law in Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985), *cert. denied*, 480 U.S. 916, 107 S.Ct. 1369 (1987):

> We fail to see, however, that these bystanders have proved an independent cause of action under § 1983. Negligent infliction of emotional distress is a state common law tort; there is no constitutional right to be free from witnessing this police action. "Section 1983 imposes liability for violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law." [The bystanders] may not recover these damages.

767 F.2d at 172, quoting Baker v. McCollan, 443 U.S. 137, 146, 99 S.Ct. 2689, 2695-96, 61 L.Ed.2d 433 (1979).

Jerry Gates also claims a Fourteenth Amendment liberty interest "grounded in his relationship with his child, and in the loss of her companionship and society" pursuant to Curnow v. Ridgecrest Police, 952 F.2d 321, 325 (9th Cir. 1991), *cert. denied*, 506 U.S. 972, 113 S.Ct. 460 (1992).[9] Curnow is distinguishable from Jerry Gates' claims as Curnow is a wrongful death case. Jerry Gates cites no authority supporting his claim and the court declines to extend the Due Process Clause in this matter. Jerry Gates' remaining claims arise under state law, and the court will exercise supplemental jurisdiction

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[9] *See* Plaintiffs' Objections to R & R, p.11.

over those claims.

Accordingly, and for the foregoing reasons,

the Motion to Dismiss [Docket No. 14] is **GRANTED IN PART** and **DENIED IN PART**.

IT IS ORDERED that (1) all of Cherie Shipp's alleged federal constitutional claims, **with the exception of** the equal protection claim and related failure to train claim be **DISMISSED WITH PREJUDICE**; (2) all federal claims by plaintiff Jerry Gates be **DISMISSED WITH PREJUDICE**; (3) all federal claims against Sheriff Theodore L. Riser be **DISMISSED WITH PREJUDICE**; and (4) that the motion be **DENIED** in all other respects.

IT IS FURTHER ORDERED that the court shall exercise supplemental jurisdiction
pursuant to 28 U.S.C. § 1367 over the plaintiffs state law claims against all defendants.

IT IS FURTHER ORDERED that the plaintiffs shall file a reply to Deputies Steve Cropper and Betty Shipp's defense of qualified immunity under the heightened pleading standard within sixty (60) days of this order.

THUS DONE AND SIGNED in Shreveport, Louisiana, this 26 day of March, 1998.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CHERIE SHIPP and JERRY GATES
Plaintiffs

NO.: CV97-0308 S

VERSUS

JUDGE: WALTER

ROYCE L. MCMAHON, THEODORE L. RISER, STEVE CROPPER, and BETTY SHIPP
Defendants

MAG.: PAYNE

JURY DEMAND

SECOND AMENDED COMPLAINT

(Filed May 13, 1998)

1. This is a suit for declaratory, injunctive and monetary relief pursuant to 42 U.S.C.§§1983, 1988, the Fifth and Fourteenth Amendments to the Constitution of the United States, Article I,§§ 2, 3 &12 of the Louisiana Constitution, and Louisiana Civil Code articles 2315 and 2315.6.

Jurisdiction

2. Jurisdiction is invoked pursuant to 28 U.S.C. §§1331, 1343(a)(3),(4), and 2201. Plaintiffs further invokes the supplemental jurisdiction of this Court to hear and decide claims arising under state law pursuant to 28 U.S.C. § 1367.

Parties

3. Plaintiffs herein, both adult citizens of the United States, are:

a. Cherie Shipp, a resident of Webster Parish, Louisiana, and
b. Jerry Gates, a resident of Webster Parish, Louisiana and the father of plaintiff Cherie Shipp.

4. Defendants herein, all sued in their official and individual capacities, are:

a. Royce L. McMahon, at times pertinent herein the Sheriff of Webster Parish, Louisiana;
b. Theodore L. Riser, the present Sheriff of Webster Parish, Louisiana;
c. Steve Cropper, a Webster Parish Sheriff's Office ("WPSO") deputy, employed in a supervisory capacity by the defendant Sheriffs, and
d. Betty Shipp, employed as a WPSO employee and deputy by the defendant Sheriffs.

Facts

5. On May 19, 1996, and into the early hours of May 20, 1996, plaintiff Cherie Shipp was kidnaped in Webster Parish by her estranged husband, Dalton Shipp, when he forcibly seized her from the Minden, Louisiana residence of one of her sister's, where she had sought refuge from his long-standing physical and mental abuse, together with his willful, malicious and repeated following and harassing of her with the intent to place her in fear of death or great bodily harm. These stalkings not only constituted felony offenses under the criminal

law of Louisiana, but were reported to WPSO deputies, including defendant Steve Cropper, to no avail.

6. More specifically, Cherie Shipp had fled from the abusive marital domicile on October 29, 1995 to a sister's house near Minden. To force her to return, Dalton Shipp began a pattern of threats and harassments against her, which included several threatening phone calls. Cherie Shipp reported these incidents to WPSO deputies, to no avail. After he had driven slowly by the sister's house several times in an obvious effort to further intimidate her, she reported this to defendant Cropper, who advised that he would do nothing about it. She then sought refuge at her cousin's home in the Webster Parish town of Dubberly.

7. In November of 1995, Dalton Shipp invaded this cousin's home, where, following a vicious verbal assault on Cherie Shipp in the presence of her children, he ripped a telephone from the wall and attacked and beat her with it. He then threw her into a wall and struck her with his fist. Following this attack he told her that if she reported the incident to any law enforcement agency, that she would "find [herself] in the hospital". Dalton Shipp then fled the premises having Cherie Shipp's vehicle in his control. The vehicle that was taken contained items belonging to Ms. Shipp and her cousin, including their children's clothing.

8. Cherie Shipp quickly reported these offenses by telephone to the WPSO. After some delay, Defendant Cropper came to the cousin's residence and took a report, but made no immediate effort to seek and arrest Dalton Shipp.

9. After several days of delay, Cropper met with Dalton Shipp, asked him to return the clothing, but did not arrest him. Thereafter, on November 19, 1995 Dalton Shipp

was allowed to present himself at the Webster Parish Courthouse, where he was cited for Simple Criminal Damage to Property and Simple Battery, misdemeanor offenses relating to the attack and thefts at the cousin's home. Under Louisiana law, a battery committed with a dangerous weapon constitutes the felony offense of Aggravated Battery. Notwithstanding that Cherie Shipp had advised defendant Cropper that Dalton Shipp had struck her with a telephone, Cropper only cited Dalton Shipp with the lesser offense of Simple Battery.

10. On November 27, 1995, Dalton Shipp appeared in court to respond to the charges. As a condition of his bail obligation, the Court ordered him to stay away from Cherie Shipp. Later that same day, Dalton Shipp returned to court and pled guilty to both offenses. He was remanded for sentencing and was ordered to return on January 8, 1996 for sentencing. He was also ordered to immediately seek counseling with the YWCA Family Violence Program in Shreveport, which he did not do.

11. On December 1, 1995, a Temporary Restraining Order issued against Dalton Shipp from the Twenty-Sixth Judicial District Court in and for Webster Parish, Louisiana, the prohibitions of which included any harassment or abuse of Cherie Shipp, including any contact with her. Dalton Shipp was personally served with this Order by defendant Steve Cropper.

12. After the Restraining Order was served on him, and notwithstanding the prohibitions contained therein, as well as the directives of the criminal court Judge (see ¶10 above), Dalton Shipp made several abusive and threatening phone calls to Cherie Shipp, which she reported to the WPSO, but was told nothing could be done. Dalton Shipp was never arrested for

violating the Restraining Order, nor for violating the Court's criminal bail obligations.

12A. Since his post-separation conduct was done to force her to return (see ¶6), the Temporary Restraining Order had simply served to enrage Dalton Shipp. Appropriate training would have alerted the defendants to such predictable behavior. In any case, the defendants were well aware of his past abusive and criminal behavior and propensity for violence so that such a reaction by Dalton Shipp was entirely foreseeable. Nevertheless, by not arresting him, the defendants manifested a deliberate indifference to the enhanced danger they were creating to Cherie Shipp, as well as a discriminatory intent on the part of the defendants, including deputies Cropper and Shipp, to treat female victims of domestic violence, and Cherie Shipp in particular, differently than similarly situated males.

13. On January 8, 1996, Dalton Shipp did not appear, and a Bench Warrant for his arrest was issued by the sentencing Judge. Notwithstanding this Order, and despite subsequent criminal court appearances by Dalton Shipp at the Webster Parish Courthouse to face other criminal charges, WPSO deputies, including defendants Cropper and Betty Shipp, failed and refused to arrest him.

13A. The inaction on the part of defendants expressed in paragraphs 12 and 13, above, comprised a lack of training and a discriminatory intent on the part of all defendants and WPSO deputies to treat female victims of domestic violence, and Cherie Shipp in particular, differently than similarly situated males. Such inaction also meant that Dalton Shipp was given a "green light" to proceed against Cherie Shipp with impunity, signaling to him that this law enforcement agency and its deputies would not interfere with any further harm he carried out against her.

14. Since he had not been arrested for his earlier domestic abuse crimes against the person of Cherie Shipp (see ¶5), and had not been charged with the appropriate degree of criminal battery (¶ 9) for his November, 1995 attack (¶ 7), all of which would have provided the bases for enhanced sentences for those crimes against her for which he was subsequently arrested and convicted (¶ 10), and/or because no effort was made to apprehend him after January 8, 1996 (¶ 13), Dalton Shipp was not in jail, and was thus able to perpetrate his serial criminal offenses of May 19-20, 1996.

15. During the late evening hours of May 19, 1996, Dalton Shipp tracked Cherie Shipp to the home of another sister, with whom she was then staying, which is in an apartment complex in Minden, Webster Parish, Louisiana. Having his assurance that he simply wished to "talk", Cherie Shipp stepped out to the parking lot with him, hoping that such contact might alleviate the harassments and stalkings she had experienced at his hands.

16. Once he had her outside the sister's apartment, Dalton Shipp asked Ms. Shipp to sit in his vehicle to talk. As a result of an automobile accident, her left leg was in a plaster cast, and she used crutches, so she was only able to sit sideways in the passenger seat, with her feet on the ground.

17. Once she was seated, Dalton Shipp suddenly started the car. He then backed violently out of the parking space, and sped out of the parking lot with Cherie Shipp's legs dragging the ground. She made an effort to escape by jumping out, but he grabbed her by the hair to keep her in the vehicle. He then drove her to a house leased by him in the town of Sibley (Webster Parish), a few miles from Minden.

18. Having witnessed the foregoing through the

window, plaintiff's sister quickly telephoned her mother, Carolyn Gates, who immediately telephoned the WPSO and reported the kidnapping. The WPSO dispatcher receiving Ms. Gates' call was defendant Betty Shipp. Upon receiving the call, Betty Shipp hung up the telephone with no inquiry of any kind as to details or particulars.

19. Present with defendant Betty Shipp when the call from Carolyn Gates was received was defendant Steven Cropper, who was in charge of the WPSO shift on duty at the time. Advised of the call, he chose to take no action, notwithstanding his full knowledge, like that of the department as a whole, of Dalton Shipp's propensity for physical violence, and of reported and witnessed incidents of his prior physical abuse of Cherie Shipp. Further, neither Cropper nor Betty Shipp dispatched any radio transmission at this point to alert deputies on duty or other law enforcement agencies of the emergency.

20. Promptly upon having her call to the WPSO terminated by defendant Betty Shipp, Carolyn Gates telephoned the Minden Police Department, whose radio operator not only dispatched the emergency alert, but radioed the WPSO with the kidnapping information as well. Carolyn Gates immediately drove to plaintiff Jerry Gates' place of business, picked him up, and hurriedly drove to the Webster Parish Courthouse, where they observed defendant Cropper standing idly outside the Courthouse.

21. Upon being advised by Cropper that he intended doing nothing to apprehend Dalton Shipp, Mr. Gates told Cropper where he believed Shipp might be headed. Cropper disagreed, indicating that Dalton Shipp might be going to the leased residence in Sibley referred to in Paragraph 17. Mr. Gates, denouncing the deputies' unwillingness to take action,

announced his intention to go to Sibley, and quickly departed in his vehicle, accompanied by Carolyn Gates. Cropper immediately took up pursuit of plaintiff Gates in his police vehicle, accompanied by WPSO Deputy "Dusty" Reynolds.

22. Defendant Cropper and Deputy Reynolds, WPSO Deputy Jay Hortman, and plaintiff Jerry Gates with Carolyn Gates soon arrived at the house in Sibley in close order, followed by WPSO Deputy Robbie Hayden. Defendant Cropper was the senior and ranking deputy on the scene.

23. Despite Cropper knowing the exigent circumstances, which, with the outstanding arrest warrant (see ¶13), clearly constituted sufficient cause to enter the building, and despite all present being fully aware of Dalton Shipp's propensity for and history of violence against the person of Cherie Shipp, all the deputies refused to make any effort to enter the house, arrest Dalton Shipp, rescue Cherie Shipp, or intervene in any way.

24. Frantic with fear for his daughter's safety, Mr. Gates made an effort to approach the house, but was restrained by Deputy Hortman. Defendant Cropper then went to the side door of the house and politely knocked. Cropper said that he was required to determine whether Cherie Shipp was with Dalton Shipp "voluntarily". Receiving no response, he proceeded to the front door, where he repeated this inappropriate knocking/inquiry. There was still no response from the interior of the house.

25. At this time Mr. Gates observed a man's silhouette against a curtain. The man appeared to be picking up a long object leaning against the wall. Visibly alarmed, Mr. Gates exclaimed that Dalton Shipp was carrying a gun, and began to express his alarm both for his daughter's safety and the

apparent unwillingness of the deputies to take any action in this emergency. As he again began to approach the house, Deputy Jay Hortman ordered him to stay back. Mr. Gates was forced to comply.

26. At this time, and while the deputies were still standing around, a gunshot rang out from inside the residence. Still making no move to enter the building, the deputies' response was to dash for the safety of their vehicles, where all but Cropper began to don armored vests.

27. Shortly thereafter, another gunshot rang out from within the residence. Again, there was no move on the deputies' part to enter the building for rescue or any other purpose. They remained crouched behind their police vehicles.

28. Meanwhile, inside the house, Dalton Shipp had raped plaintiff Cherie Shipp. He had then pointed a loaded 12 gauge shotgun at her chest and pulled the trigger. The blast ripped through her left breast and blew a hole through her back. Dalton Shipp had then shot himself.

29. Cherie Shipp, bleeding profusely from the shotgun blast and near death, staggered to the front door in an effort to escape the premises. When she could not open the front door, she screamed to those on the outside for assistance. Still the deputies made no move to come to her aid. At this point Cherie Shipp struggled to the side door, managing to open it, and staggered outside, holding her exposed entrails in one hand while holding the other hand in the air. Nude, bleeding, and in great agony, she began gasping for help. Carolyn Gates and Deputy Jay Hortman raced to her side to render aid.

30. At this point, Mr. Gates dashed toward her

daughter, but was waylaid by defendant Steve Cropper, who would have pistol-whipped him but for the intervention of Carolyn Gates. As it was, Cropper ordered Deputy Reynolds to handcuff Mr. Gates and to remove him. Reynolds did as he was ordered.

31. Cherie Shipp was belatedly transported to the hospital in Minden, where emergency room procedures saved her life. She remained in the hospital for a period of weeks. She was then moved to a rehabilitation/physical therapy/nurse care facility in Minden. From there, she had periodic returns to the hospital for further surgery and repair, including skin grafts.

32. She was discharged to home care at her sister's apartment at the end of August, 1996, where she spent several weeks confined to bed. Despite being heavily medicated at times, this plaintiff was in constant, sometimes excruciating pain. Also, she was forced to wear a colostomy bag from the time of the initial emergency room procedure on May 20, 1996 until August 8, 1996. After the colostomy bag was removed, the exit-wound hole in her back began to exude fecal matter, and she had to return to the rehabilitation facility for treatments of infection. More testing was done on her colon, which required a very painful series of Barium enemas.

33. On October 16, 1996, Ms. Shipp required re-hospitalization for surgery to re-open the exit wound for treatment of an abscess. She was released four days later pending further complications.

34. Recovering from his own wound, Dalton Shipp was arrested on July 11, 1996, and awaits prosecution on charges of Aggravated Rape, Aggravated Kidnapping and Attempted 2nd Degree Murder.

35. Since the time of his arrest and detention, Dalton Shipp has been permitted on several occasions to depart the Webster Parish jail and roam relatively free and unfettered in and around Minden and Webster Parish. In particular, he has been permitted by defendant Riser, through his deputy, defendant Betty Shipp, to be transported, free of handcuffs and shackles, not only in and around the environs of Webster Parish, but as far away as Caddo Parish.

35A. On one such occasion, during the tenure of defendant Sheriff Riser, Cherie Shipp was told directly by an eye witness that Dalton Shipp was seen, free of handcuffs, shackles or restraints of any kind, and in street clothes, drinking coffee in a public place with his mother, defendant Betty Shipp. Not knowing if he had been freed of charges, or otherwise released from jail, plaintiff Cherie Shipp became terrified by this information, which was also received by her father, because she felt that, having tried to kill her once, Dalton Shipp would now make another attempt on her life.

36. Between the time of the events of May 19-20, 1996 and the filing of the instant lawsuit, defendant Sheriff McMahon's term in office expired, and he was replaced by defendant Sheriff Riser. Sheriff Riser has been apprised of the events of May 19-20, including the conduct and behavior of his employees and deputies throughout, but, to the plaintiffs' knowledge, he has imposed no discipline on any deputy or employee, nor has he taken any remedial steps to train or otherwise require them to follow the law with regard to domestic violence cases. In particular, he has not disciplined any deputy, including defendants Cropper and Betty Shipp for their inappropriate conduct, deliberate indifference and gross negligence during the events of May 19-20, 1996, nor has he disciplined defendant Betty Shipp for transporting Dalton Shipp as set forth in Paragraph 35 above.

Causes of Action

37. On a number of occasions over several years preceding the May 19-20 events complained of herein, Cherie Shipp had sought the service and protection of the WPSO and its deputies and employees, including defendant Cropper, from stalkings as well as the threats of and repeated acts of assault, battery, aggravated assault, aggravated battery and second degree battery perpetrated against her by Dalton Shipp, to no avail. Prior to the subject May 19-20 incident, employees of the WPSO, including all defendants herein except Riser, had consistently refused to carry out their duties prescribed by law, including repeated failures to effect the arrest of Dalton Shipp, even when faced with witnessed attacks by him on the person of Cherie Shipp, some of which clearly represented felony criminal conduct. These refusals and failures show an intent on the part of the defendants, including Cropper and Betty Shipp, to treat female victims of domestic violence, and Cherie Shipp in particular, differently than similarly situated males.

38. At the time of the shooting, an arrest warrant, described in Paragraph 13, above (attached herewith, together with the pertinent transcript excerpt) had been issued in open court, in front of WPSO deputies, for the arrest of Dalton Shipp. Through their deliberate indifference and gross negligence, all defendants except Riser failed to execute, and in fact ignored this warrant. Likewise, they failed to arrest Dalton Shipp when, before sentencing, he violated the bail obligation to stay away from Ms. Shipp imposed by the State Court on the day of his criminal arraignment. They also failed and refused to arrest him for violating the Restraining Order (attached herewith). Defendants failed to act due to their discriminatory intent to treat female victims of domestic violence, and Cherie Shipp in particular, differently than similarly situated males. These failures constitute violations of Ms. Shipp's substantive due

process and equal protection rights under the Fourteenth Amendment of the United States Constitution and LSA-Const. Art. 1., §§ 2, 3 & 12 which caused damage to both plaintiffs.

39. Ms. Shipp was also damaged by the deliberate indifference and gross negligence of all defendants as to their affirmative duties under law to protect her from known dangers, including those set forth in Paragraphs 35 and 37, above, which violated her due process rights and protections under both State and Federal Constitutions by recklessly placing Cherie Shipp in a situation of increased danger, easily foreseeable to the law enforcement defendants in this case.

39A. The conduct of defendants, including deliberate indifference and gross negligence, expressed in paragraph 39, also manifested the individual defendants' intent to treat female victims of domestic violence, and Cherie Shipp in particular, differently than similarly situated males.

40. By refusing to enter the subject premises as set forth in Paragraph 23 hereinabove, the deputies involved, including defendant Cropper, ignored the clear mandatory-arrest mandate of LSA-R.S. 46:2140 (attached herewith). There was also an outstanding arrest warrant for Dalton Shipp at the time of the shooting (that Sheriff McMahon and the WPSO defendants deliberately chose to ignore). There was also a court order issued to Dalton Shipp in open court, in front of WPSO deputies, by the state Judge, ordering him to stay away from Ms. Shipp as a condition of bail. Finally, there was a Restraining Order issued against Dalton Shipp by the same state Judge, for the protection of Cherie Shipp. Louisiana law mandates arrest for a violation of such a Restraining Order (statute attached). These create liability for these defendants because they denied to plaintiff Cherie Shipp entitlements that the state voluntarily created: she had orders of protection, laws

requiring the police to enforce the orders, and statutes which, under the facts herein expressed, required arrests that were clearly ignored, all of which constituted denials to Cherie Shipp of procedural due process under both Louisiana and United States constitutions.

40A. The allegations contained in paragraph 40 also show an intent, on the part of the defendants, to treat female victims of domestic violence, and Cherie Shipp in particular, differently than similarly situated males.

41. Because the State of Louisiana, through legislative or executive mandate, provided defendant Sheriff McMahon with the position and authority he held, he was the maker of policies in accordance with which the practices described below caused injury to the plaintiffs. These policies were carried out by WPSO employees, including defendants Cropper and Betty Shipp. Defendant Riser became similarly liable when he fostered, perpetuated and thus adopted these same policies. These policies damaged Ms. Shipp, and thus her father, by violating her due process and equal protection rights under the Fourteenth Amendment to the United States Constitution, through 42 U.S.C.1983, and under the Louisiana Constitution as well.

42. As a result of the policies and practices set out below, and because on prior occasions plaintiff Cherie Shipp was abandoned by WPSO personnel, including defendant Cropper, back to the continued reign of terror and abuse that continued to be inflicted upon her by Dalton Shipp, and because their conduct, including that of Betty Shipp, (which were part and parcel of said policies), resulted in her being shot, plaintiff Cherie Shipp has been denied the equal protection and due process due her under the Louisiana Constitution, which denials have resulted in her damage, and damage to her father.

Defendants' action and/or failures to act were due to their discriminatory animus against domestic violence victims.

43. The acts and failures to act alleged on the part of all defendants exhibit a department-wide lack of domestic violence training, which defendants McMahon and Riser directly or constructively knew was inadequate by virtue of a long-standing, widespread and reckless disregard of any rules or training respecting domestic violence provided for their employees, including those made defendants herein. Each of these policy-making defendants made a conscious choice to accept such conduct, which was done on such a common and well-settled basis as to constitute customs that represent their expected, accepted policies, which were the respective moving forces of the constitutional violations shown. WPSO deputies, including those made defendants herein, exemplified by their conduct a flagrant manifestation of this inadequate training and supervision, showing not only their individual intent to treat female victims of domestic violence, and Cherie Shipp in particular, differently than similarly situated males, but also that these employees knew that their conduct would meet with approval.

44. The total inadequacy of the defendant Sheriffs' respective domestic violence training programs is tantamount to a policy of lesser protection for domestic violence victims with a deliberate indifference to the policy's disproportionate impact on women. They also amount to a deliberate indifference on the part of all defendants to the need for heightened protection for victims of domestic violence in Webster Parish.

45. It has also been the policy or custom of the defendant Sheriffs and their WPSO deputies and employees, including defendants Cropper and Betty Shipp, to provide less

police protection to victims of domestic assault than to other assault victims, and for deliberately adopting this classification disparity to, and so as to discriminate against women, as well as to deliberately neglect battered women's serious needs for medical treatment.

46. The policies described has also had a disparate impact on victims of domestic violence, which together with the policy's long historical basis and the policy's extremely discriminatory effect on women will show the intent of the policy, as well as those of the individual defendants, to discriminate. The treatment of domestic violence cases by the WPSO through its deputies and employees, including defendants Cropper and Betty Shipp in this case, implemented such policy in a discriminatory fashion.

46A. Defendant McMahon, while Sheriff of Webster Parish, has made overtly discriminatory statements regarding women in domestic violence matters. Such conduct shows his intent and that of his policies to discriminate against women and female domestic assault victims, and further shows that he selected such a course of discriminatory action as his policies demonstrate because of their adverse effect upon women and female victims of domestic violence.

47. During the tenures of the defendant Sheriffs, there has been a standing, if unwritten rule that deputies are not to arrest persons violating Restraining Orders, which also constitutes a failure to adequately protect female victims of domestic violence.

48. The refusals by WPSO deputies, including defendant Cropper, to arrest Dalton Shipp for his crimes against the person of Cherie Shipp prior to May 19, 1996, defendant Cropper's failure to actively pursue the arrest of Dalton Shipp

for the telephone battery and theft(s) incident, the failure by WPSO deputies/employees to arrest Dalton Shipp as shown in Paragraph 38, as well as after January 8, 1996, and defendant Cropper's conduct in taking no action to apprehend Dalton Shipp when Carolyn Gates had called the WPSO dispatcher office (see ¶19), or outside the Webster Parish Courthouse when Carolyn Gates and Jerry Gates arrived, and defendant Betty Shipp's conduct in hanging up on Carolyn Gates (see ¶18), and her inaction thereafter (see ¶19), were all in accordance with this arrest-avoidance policy of the defendant Sheriffs and the WPSO regarding domestic abuse against women.

49. This deliberate arrest-avoidance policy actively discouraged and continues to discourage deputies from intervening in domestic violence cases. WPSO deputies are taught that domestic violence cases are domestic and civil matters. Domestic violence calls are ignored or at best given very low priority. Arrest of an abuser is generally avoided unless a deputy feels that he has to maintain police authority.

50. The policies and customs described above which denied Ms. Shipp protections under both state and federal Constitutions is evident not only from the defendant Sheriffs' refusal to discipline WPSO employees, including defendant deputies Cropper and Betty Shipp for their conduct throughout, but by their refusals to accept domestic violence training for WPSO employees provided free of charge by the YWCA Family Violence Program in Shreveport to all other Sheriffs in the northwest Parishes of Louisiana, and by their refusal to discipline or to subsequently train or retrain their employees, which also violates 42 U.S.C. 1983 by encouraging unconstitutional conduct by their deputies and employees.

51. The acts and conduct of the individual

defendants, including omissions, constitute negligence, gross negligence, and the intentional infliction of emotional distress under state law, which damaged Cherie Shipp and her father. Additionally, defendants McMahon and Riser are vicariously liable under state law for such acts and omissions by their employees and deputies, and are thus responsible for the resultant damages. This Court should exercise its supplemental jurisdiction to hear and adjudicate such claims.

52. In their individual capacities, none of the WPSO employees or deputy defendants, nor the defendant Sheriffs, may avail themselves of the defense of qualified immunity, because the law, clearly established at the times pertinent herein, was and remains such that the acts and omissions alleged herein were in no way objectively reasonable. These law enforcement officers are presumed to know the clearly established constitutional rights of citizens; both LSA-R.S. 46:2140 and LSA-R.S. 14:34.1 have been in effect for years.

Damages

53. As a result of the physical trauma which resulted through defendants' fault through their actions and inactions before, during, and after the events of May 19-20, 1996, plaintiff Cherie Shipp suffered and continues to suffer extreme physical and mental pain, both of which will require future medical and psychiatric treatment. She is presently under psychiatric care, and will need such treatment far into the future. Among other things, she suffers from post-traumatic stress disorder and severe depression.

54. Ms. Shipp has a mid-line scar that runs from her sternum to the bottom of her abdomen. The shotgun blast entered the left side of her chest, tearing off most of her left breast, leaving deep scars from powder burns. The slug

damaged several ribs, destroyed her left kidney, and parts of her lung, liver, stomach and colon. She also has several permanent scarrings, including one below her navel from a feeding tube, and those in her chest and armpit from mainline intravenous tubes. She continues to be in pain, with the expectation of a lifetime of physical complications from the trauma and repair procedures.

55. As the result of the acts and failures to act on the part of defendants herein, which caused the injuries she suffered, Cherie Shipp has incurred extensive medical expenses.

56. On May 19, 1996 Cherie Shipp was employed as a restaurant cashier. She returned to work at the restaurant on or about October 4, 1996. As a result of the acts and failures to act on the part of defendants herein, she has a claim for lost wages.

57. Plaintiff Jerry Gates was involved with the entire spectrum of events of May 19-20, 1996. He thus suffered the extreme anguish of witnessing his daughter's ordeal and agony, helpless before the appalling ineptitude and deliberate indifference of the defendant Sheriffs and their employees. Beyond this, he had to suffer the prior indifference of these defendants and their WPSO employees to the previous domestic abuse upon his daughter by Dalton Shipp. The events of May 19-20, 1996 exacerbated his prior emotional damage, and he has suffered and will continue to suffer deep and abiding emotional pain which requires and will continue to require psychiatric medical treatment in the future.

58. The ability of Dalton Shipp to be in and among the general public while under arrest and prosecution for crimes, including ones requiring life sentences, and while in the

custody of the WPSO, has increased substantially the emotional damage to both plaintiffs.

59. The malicious, wanton and oppressive acts and failures to act on the part of all defendants described herein, done in bad faith, constitute a reckless disregard and callous indifference to the constitutionally protected rights of plaintiffs herein. Awards of punitive damages are thus warranted.

60. Trial by jury is requested for all matters triable to a jury.

WHEREFORE plaintiffs request the following relief against the defendants, jointly, severally and in solido:

I. Judgment declaring (A) that the defendants' liability attaches under 42 U.S.C. 1983 in that they violated plaintiff Cherie Shipp's Constitutional rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 3 & 12 of the Louisiana Constitution, and that they did conspire to violate same, and did neglect or refuse to prevent the violations of these rights despite their knowledge of and power to prevent said violations, and (B) that defendants' policies and practices regarding domestic abuse complained of herein are illegal and otherwise in violation of law.

II. That this Court order the following injunctive relief (A) enjoining the Webster Parish Sheriff's Department, Sheriff Ted Riser, and/or the Webster Parish Sheriff's Deputies, including defendant Betty Shipp, from permitting Dalton Shipp to roam free and unfettered in Webster Parish or elsewhere absent lawful release from detention; (B) permanently enjoin the defendants and all WPSO deputies and employees from refusing to respond adequately to battered women's calls; (C)

affirmatively order the defendants and all WPSO deputies and employees to respond adequately to battered women's complaints, including making arrests for violations of Restraining Orders, and violations of bail obligations in matters involving allegations of domestic abuse; (D) order defendant Riser, at WPSO expense, to immediately institute training for all WPSO deputies and employees in the law and proper procedures for handling domestic abuse matters; (E) order defendant Riser, at WPSO expense, to start a batterer treatment program; (F) order defendant Riser, at WPSO expense, to establish a shelter for battered women, and (G) to immediately accept such deputy training and assistance as may be offered by the YWCA Family Violence Program in Shreveport;

III. That plaintiffs be awarded compensatory damages;

IV. That plaintiffs be awarded punitive damages;

V. An award of such other relief to which plaintiffs may be entitled, including all costs of this action and attorneys' fees pursuant to 42 U.S.C. §1988.

WALKER, TOOKE & LYONS, L.L.P.
1700 Irving Place
Shreveport, Louisiana 71101
(318) 221-8644

By: /s/ Henry C. Walker
Henry C. Walker, No. 13059

ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CHERIE SHIPP, and JERRY GATES	**CIVIL ACTION NO. 97-0308**
VERSUS	**JUDGE WALTER**
ROYCE L. MCMAHON, THEODORE L. RISER, STEVE CROPPER, and BETTY SHIPP	**MAG. JUDGE PAYNE**

REPORT AND RECOMMENDATION
(Entered September 21, 1998)

Cherie Shipp, whose abusive husband kidnapped her and shot her in the chest with a 12-gauge shotgun, survived to file this civil rights case against the current and former Sheriffs of Webster Parish and Deputies Steve Copper and Betty Shipp. She and her father assert several constitutional and state law claims. The defendants responded to the original complaint with a motion to dismiss on a variety of grounds, including qualified immunity. The undersigned issued a recommendation (Doc. 27) that the motion be granted in part and denied in all other respects, including the qualified immunity defense. In response to the recommendation, both parties filed objections and the plaintiffs filed a first amended complaint.

After conducting a de novo review, Judge Walter issued a Memorandum Ruling that ordered the same relief recommended by the undersigned. He further ordered that the plaintiffs "file a reply [under *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995)(en banc)] to Deputies Steve Cropper and Betty Shipp's defense of qualified immunity under the heightened

pleading standard". (Doc. 40) The defendants filed a motion that requested that Judge Walter reconsider portions of that ruling, including the decision that the constitutional claims against Cropper and Shipp could go forward. (Doc. 41) The motion was denied. (Doc. 53) Plaintiffs, in response to the Order that they file a *Schultea* reply, filed a Second Amended Complaint that added additional allegations. (Doc. 51) Judge Walter then wrote that, "After reviewing plaintiffs' Second Amended Complaint, the Court finds that plaintiffs have complied with the heightened pleading standard". He also ordered that "Deputies Cropper and Shipp are not entitled to qualified immunity for failure to plead with particularity." (Doc. 52) Defendants then came back for a third bite at the qualified immunity apple by filing this "Motion to Dismiss Second Amended Complaint and Motion for More Definite Statement". (Doc. 56)

Judge Walter has now reviewed the pleadings three times and has specifically denied the relief requested in the motion. Although the movants have cited some new authorities and have polished their arguments, the undersigned sees no change in precedent or other development that would warrant a recommendation that Judge Walter reverse his prior rulings.

Accordingly,

IT IS RECOMMENDED that the Motion to Dismiss Second Amended Complaint and Motion for More Definite Statement (Doc. 56) be **DENIED**.

Objections

Under the provisions of 28 U.S.C. §636(b)(1)(C) and Fed.R.Civ.Proc. 72(b), parties aggrieved by this recommendation have ten (10) business days from service of

this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed.R.Civ.P. 6(b). A party may respond to another party's objections within ten (10) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 10 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. See *Douglass v. U.S.A.A.*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 21st day of September, 1998.

/s/ Roy S. Payne
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CHERIE SHIPP, and JERRY GATES — **CIVIL NO. CV97-0308**

VERSUS — **JUDGE WALTER**

ROYCE L. MCMAHON, THEODORE L. RISER, STEVE CROPPER, and BETTY SHIPP — **MAG. JUDGE PAYNE**

ORDER
(Entered November 2, 1998)

For the reasons assigned in the Report and Recommendation of the Magistrate Judge previously filed herein, and having thoroughly reviewed the record, including the written objections filed, and concurring with the findings of the Magistrate Judge under the applicable law;

IT IS ORDERED that the combined Motion to Dismiss Second Amended Complaint and Motion for More Definite Statement (Doc. 56) is **DENIED**.

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 2nd day of November, 1998.

/s/ Donald E. Walter
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CHERIE SHIPP, ET AL. **CIVIL NO. CV97-0308**

VERSUS **JUDGE WALTER**

ROYCE L. MCMAHON, ET AL. **MAG. JUDGE PAYNE**

ORDER

(Entered May 15, 1998)

In an earlier Memorandum Ruling and Order [Docket No. 40], the Court ordered plaintiffs to file a reply to Deputies Cropper and Shipp's defense of qualified immunity under the heightened pleading standard. See Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995)(en banc). Plaintiffs have filed a Second Amended Complaint that suffices as the reply ordered by the Court. Defendants did not oppose plaintiffs' motion to file the Second Amended Complaint.

After reviewing plaintiffs' Second Amended Complaint, the Court finds that plaintiffs have complied with the heightened pleading standard. Accordingly,

IT IS ORDERED that Deputies Cropper and Shipp are not entitled to qualified immunity for failure to plead with particularity.

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 15th day of May, 1998.

/s/ Donald E. Walter
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CHERIE SHIPP, ET AL.	**CIVIL NO. CV97-0308**
VERSUS	**JUDGE WALTER**
ROYCE L. MCMAHON, THEODORE L. RISER, STEVE CROPPER, and BETTY SHIPP	**MAG. JUDGE PAYNE**

NOTICE OF APPEAL
(Filed November 25, 1998)

NOTICE is hereby given that ROYCE L. MCMAHON, THEODORE L. RISER, STEVE CROPPER, and BETTY SHIPP, defendants in the above named action, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the District Court's Order in this action signed on November 2, 1998, and filed on November 3, 1998, which order denied defendants' qualified immunity as set forth in defendants' Motion to Dismiss Second Amended Complaint and Motion for More Definite Statement.

Respectfully submitted this the 25th day of November, 1998.

COOK, YANCEY, KING & GALLOWAY
A Professional Law Corporation

By: /s/ James R. Sterritt
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31317

CHERIE SHIPP, JERRY GATES

Plaintiffs-Appellees,

versus

ROYCE L. MCMAHON, Sheriff of Webster Parish, Louisiana STEVE CROPPER, Webster Parish Sheriff's Office Deputy BETTY SHIPP, Webster Parish Sheriff's Office Deputy THEODORE L. RISER, Sheriff of Webster Parish Louisiana,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana, Shreveport Division

(Entered January 7, 2000)

Before POLITZ and STEWART, Circuit Judges, and LITTLE, District Judge of the Western District of Louisiana, sitting by designation.

CARL E. STEWART, Circuit Judge:

This case involves the appellants' challenge to the district court's denial of their motion to dismiss the plaintiff's

claims brought under 42 U.S.C. § 1983 and state tort law. For the reasons stated below, we affirm the district court's ruling.

FACTUAL AND PROCEDURAL HISTORY

The appellee, Cherie Shipp (Shipp) was involved in an abusive marriage with her husband. Dalton Shipp ("Dalton") in Shreveport, Louisiana. To escape her husband's abuse, Shipp moved into her sister's house near Minden, Louisiana. When Dalton learned of her whereabouts, he made several threatening phone calls to her, which she reported to deputies of the Webster Parish Sheriff's Office ("WPSO"). Dalton also on several occasions drove by Shipp's sisters house, which Shipp reported to defendant Steve Cropper ("Cropper"), a Webster Parish deputy. Cropper advised that he would do nothing about Dalton.

Shipp then moved to her cousin's residence in Dubberly, which is also in Webster Parish. Dalton went to eh house in Dubberly, attacked Shipp by beating her with a telephone that he ripped from the wall, and hit her with his fist. He threatened that if she reported the incident to law enforcement, she would "find herself in the hospital." After physically abusing her, Dalton took some items belonging to Shipp and her cousin, placed the items in his automobile, and drove off. Despite Dalton's warning, Shipp called the WPSO. Deputy Cropper came to the scene and took a report, but made no immediate effort to arrest Dalton.

Several days later, Deputy Cropper approached Dalton about returning the items he took from Shipp's cousin's residence, but did not arrest him. Dalton was later allowed to turn himself in, and he was charged with simple

criminal damage to property and simple battery, both misdemeanor offenses. As a condition of bail, the court ordered that Dalton stay away from Shipp. Later that day, he pleaded guilty to both offenses, and the court ordered him to seek immediate counseling. The court set sentencing for a later date.

Shipp obtained a temporary restraining order ("TRO") which prohibited Dalton from having any contact with her. After Deputy Cropper served Dalton with the TRO, Dalton made several abusive and threatening phone calls to Shipp, which Shipp reported to the WPSO. She was told that nothing could be done about the phone calls, and despite his violations of the TRO and the bail order, the WPSO did not arrest Dalton.

Dalton failed to appear in court for sentencing on the criminal charges, and a bench warrant for his arrest was issued. Although Dalton subsequently appeared in court to answer other criminal charges at the Webster Parish courthouse, deputies nonetheless failed to arrest Dalton for violating the TRO and conditions of bail.

Approximately four months after Dalton failed to appear at the scheduled hearing, he tracked down Shipp at her other sister's house and talked Shipp out of the house and into his car. Once in the car, Dalton sped away with Shipp's feet dragging the ground. She attempted to jump out of the car, but Dalton grabbed her by the head. Dalton drove Shipp to a house he had leased in Webster Parish.

Shipp's sister telephoned her mother, Carolyn Gates, who reported the incident to the WPSO. Defendant Betty

Shipp[10] was the dispatcher who received the phone call. Apparently, Betty Shipp hung up the telephone without conducting an inquiry into the particulars of the incident. Betty Shipp advised Deputy Cropper of the phone call. He chose to take no action, despite his knowledge of Dalton's propensity for violent behavior. Neither Cropper, or Betty Shipp dispatched information to alert the other deputies.

After having her phone call terminated by the WPSO, Shipp's mother called the Minden Police Department, which dispatched an emergency alert an radioed the WPSO. Shipp's mother then picked up Jerry Gates, Shipp's father, and drove to the Webster Parish courthouse. They observed Deputy Cropper standing idly outside the courthouse. Cropper advised Mr. Gates that he intended to do nothing to apprehend Dalton. After they discussed where Dalton may be located with Shipp, Mr. Gates denounced Cropper's unwillingness to act, and told him that he was heading to the leased house. Deputy Cropper and another deputy pursued Mr. Gates.

Subsequently, Mr. Gates and four deputies arrived at the house. When the deputies made no effort to enter the house, Mr. Gates attempted to approach the house, but was restrained by the deputies. Cropper then knocked on the door, explaining that he had to ascertain whether Shipp was in the house voluntarily with Dalton. No one inside answered Cropper's knock.

Mr. Gates observed what he believed to be a silhouette on the curtain of Dalton with a gun. Mr. Gates

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[10] The pleadings do not indicate whether Deputy Betty Shipp is related to the plaintiff or the plaintiff's husband.

again attempted to approach the house, but the deputies ordered him back. A shot rang out from the house and the deputies immediately retreated to their vehicles to put on armored vests. Another shot ranged out as the deputies remained crouched behind their cars.

Inside the house, Dalton had raped Shipp. After shooting her in the chest with a 12-gauge shotgun, he shot himself. Shipp staggered to the door and unsuccessfully attempted to open it. She screamed for help, but none of the deputies responded. Shipp eventually staggered out a side door holding her entrails in her hands.

As she exited the house, Shipp's mother and a deputy raced to her aid. Mr. Gates also dashed towards Shipp, but he was abruptly intercepted by Cropper. At Cropper's order, another deputy handcuffed Mr. Gates and removed him from the scene.

Shipp was transported to the hospital, where emergency surgery was performed on her. She was hospitalized for several weeks, followed by rehabilitation, therapy, and follow-up surgery. Dalton recovered from his wounds and was subsequently charged with aggravated rape, aggravated kidnapping, and attempted second degree murder. As of the date of this opinion, he is currently being detained in Webster Parish jail pending trial, but has been permitted on several occasions to leave the jail and roam relatively unfettered throughout Webster Parish. Since the incident, the WPSO has not imposed any discipline on any deputy.

In February 1997, Shipp and Mr. Gates filed an action under 42 U.S. § 1983 in federal district court against Sheriffs

Royce McMahon and Theodore Riser,[11] and WPSO deputies Shipp and Cropper ("defendants"). Shipp and Mr. Gates claimed that the defendants violated their federal constitutional due process and equal protection rights. Shipp and Gates also alleged claims based on Louisiana state tort law. The defendants moved to be dismissed under Rule 12(b)(6). In January 1998, the magistrate judge filed a report recommending that: (1) all of Shipp's federal constitutional claims, with the exception of the Equal Protection claim and the related failure to train claim, be dismissed with prejudice; (2) all federal claims by plaintiff Jerry Gates be dismissed with prejudice, and (3) all claims against Sheriff Theodore L. Riser be dismissed with prejudice, and (4) the motion be denied in all other aspects. The district court adopted the magistrate judge's findings and recommendation. The district court also exercised supplemental jurisdiction over the state tort law claims and ordered Shipp to file a reply responding to deputies Cropper and Shipp's defense of qualified immunity ("Schultea reply"). After reviewing Shipp's reply to the qualified immunity issue, the district court found that Shipp had met the heightened pleading standard articulated in Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995)(en banc), and denied the defendants' motion to dismiss. The defendants now appeal the district court's ruling denying their motion to dismiss based on qualified immunity.

STANDARD OF REVIEW

Denials of motions to dismiss on qualified immunity grounds are appealable collateral orders when based on issues of law. See Mitchell v. Forsyth, 472 U.S. 511, 525, 105 S.Ct.

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[11] Sheriff Riser succeeded Sheriff McMahon after the rape and shooting incident.

2806, 86 L.Ed.2d 411 (1985); Champagne v. Jefferson Parish Sheriff's Office, 188 F.3d 312 (5th Cir. 1999)(per curiam). We review the district court's ruling under Rule 12(b)(6) de novo. See Lowrey v. Texas A&M University System, 117 F.3d 242, 246 (5th Cir. 1997). A motion to dismiss under rule 12 (b)(6) "is viewed with disfavor and is rarely granted." Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, 677 F.2d 1045, 1050 (5th Cir. 1982). The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true. Campbell v. Wells Fargo Bank, 781 F.2d 440, 442 (5th Cir. 1986). The district court may not dismiss a complaint under rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). This strict standard of review under rule 12(b)(6) has been summarized as follows: "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complainant states any valid claim for relief." 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURES 1357, at 601 (1996).

DISCUSSION

The defendants argue that the district court erred when it denied their motion to dismiss. Specifically, the defendants assert that Shipp did not comply with Schultea because she failed to plead discriminatory motive for her equal protection claim with the requisite specificity. Furthermore, the defendants maintain that Shipp failed to plead causation sufficiently. The defendants also claim that the court erroneously rejected their claim of qualified immunity. Finally, the defendants argue that the court

improperly exercised jurisdiction over the pendent state law tort claims.

I. Heightened Pleading Requirement

Rule 8(a) of the Federal Rules of Civil Procedure requires a short and plain statement of the claim showing that the plaintiff is entitled to relief. Pursuant to Rule 8(a), a complaint will be deemed inadequate only if it fails to (1) provide notice of circumstances which give rise to the claim, or (2) set forth sufficient information to outline the elements of the claim or permit inferences to be drawn that these elements exist. See General Star Indemnity, Co., Vesta Fire Ins., Corp., 173 F.3d 946, 950 (5th Cir. 1999). A plaintiff suing a public official under § 1983 must file a complaint that rests on more than conclusions alone. In Schultea, we held that if a defendant raises the defense of qualified immunity, the district court may order the plaintiff under Rule 7 of the Federal Rules of Civil Procedure to file a reply tailored to anser the defendant's assertion of qualified immunity. See 47 F.3d at 1431. Furthermore, in cases involving an allegation of improper discriminatory motive, the district court may sua sponte or on the defendant's motion order the plaintiff to "'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." See Crawford-El v. Britton, 523 U.S. 574, 118 S.Ct. 1584, 1596-1597, 140 L.Ed.2d 759 (1998) (citation omitted).

Our de novo review of the pleadings, in particular Shipp's reply to the defendants' assertion of qualified immunity, reveals that Shipp has sufficiently pleaded discriminatory motive and causation. In her reply, Shipp essentially provides a fact specific historical account of the

defendants' history of failing to respond to Shipp and her mother and father's complaints about Dalton. She also details the defendants' failure to arrest Dalton for his violation of the TRO and conditions of bail. The deputies were also aware of Dalton's propensity for violence. To comply with the court's Schultea order, Shipp pleaded that the defendants' failure to act was attributable to discriminatory motive, and that the defendants' failure to act caused her injuries. Although Shipp's pleadings do not identify direct evidence of discriminatory intent, the "specific, nonconclusory factual allegations" requirement does not prevent a plaintiff from relying on circumstantial evidence. See Warnock v. Pecos County, Texas, 116 F.3d 776, 779 (5th Cir. 1997)(quoting Siegert v. Gilley, 500 U.S. 226, 236, 111 S.Ct. 1789, 1795, 114 L.Ed.2d 277 (1991)(Kennedy, J., concurring)).

Nevertheless, the defendants claim that Shipp fails to meet Schultea's specificity requirement because Shipp does not show that the defendants violated any statute or ordinance. The defendants also claim that Shipp does not show that some other citizen received protective services that Shipp was denied. The defendants also allege that Shipp does not plead that the defendants said anything that can be deemed as exhibiting invidious discrimination. Finally, the defendants assert that Shipp's injuries were caused solely by Dalton, and thus Shipp does not show causation.

However, the defendants misread Schultea's specificity requirement. Schultea does not require the level of specificity the defendants assert. The level of specificity advanced by the defendants is similar to the "clear and convincing" standard which the Supreme Court rejected in Crawford-El. In that case, the Court observed that "[n]either the text of § 1983 or any other federal statute, nor the Federal

Rules of Civil Procedure, provides any support for imposing the clear and convincing burden of proof at the summary judgment phase." Therefore, if such a heightened standard of proof is not required at summary judgment or at trial to show discriminatory intent, it follows that such a heightened standard should not be applied to determine whether a claim survives a 12(b)(6) motion to dismiss. Therefore Shipp's reply meets Schultea's requirement.

II. Qualified Immunity

The defendants claim that the district court erred when it ruled that they were not entitled to qualified immunity during the motion to dismiss phase. In order to survive a motion to dismiss, Shipp's allegations must portray an objectively unreasonable violation of a clearly established right. See Warnock, 116 F.3d at 779 (citations omitted). Thus, courts engage in a two-step analysis to address claims of qualified immunity.

First, to show that a right is clearly established, the plaintiff does not have to refer to precedent that is directly on point, or that declares that the conduct in question is unlawful. Rather, the right is clearly established if based on pre-existing law, the unlawfulness of the conduct in question is apparent. See Doe v. Independent School Dist., 15 F.3d 443, 455 (5th Cir. 1994)(en banc), cert. denied, 513 U.S. 815, 115 S.Ct. 70 (1994). Thus, the face of the plaintiff's pleadings must articulate a clearly established right at the time of the alleged violation.

Shipp's Schultea reply contends that the WPSO's failure to implement policies and training to address domestic violence amounts to a violation of Equal Protection. Apparently, because a substantial number of victims of

domestic violence are women, Shipp contends that WPSO's practices have an adverse impact on women.

To determine whether Shipp articulated a clearly established right, we begin by recognizing as a general matter, that the Equal Protection clause of the Fourteenth Amendment prohibits a state from engaging in intentionally discriminatory conduct that has a disparate impact on women unless the state can show an "exceedingly persuasive justification for that action." See United States v. Virginia, 518 U.S. 515, 530, 116 S.Ct. 2264, 2274, 135 L.Ed. 2d 735 (1996). Although there is no Supreme Court precedent directly on point as to whether a law enforcement agency's policy or course of conduct discriminating against women victims of domestic violence constitutes intentional discrimination against women under Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d. 597 (1976), the Court nonetheless observed in Deshaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), that, "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violation of the Equal Protection Clause." Id. at 197, 109 S.Ct. at 1104, n.3 (citation omitted). In McKee v. City of Rockwell, 877 F.2d 409, (5th Cir. 1989), we concluded that in order for a plaintiff to maintain her claim that the police's failure to effectuate an arrest regarding a domestic violence incident amounted to an Equal Protection violation, the plaintiff must show that "the ' non arrest' was the result of discrimination against a protected class." Id. at 144.

Although, the defendants point out that there is no constitutional violation when the most that can be said is that the police stood by and did nothing, see McKee 877 F.2d. at 412, nonetheless, Shipp did more that claim police inaction.

Shipp claims that the WPSO intentionally adopted policies and customs that afforded less protection to women victims of domestic violence than other victims. Thus, we find that Shipp articulates a clearly established right under the minimum requirements of Rule 12(b)(6).[12]

Under the second prong of the qualified immunity analysis, the plaintiff must show that the defendant's violation of a clearly established right was objectionably unreasonable. See Sanchez v. Swyden, 139 F.3d 464, 467 (5th Cir. 1998). Whether the defendants' conduct was objectionably reasonable depends on the circumstances controlling the defendants as well as clearly established law in effect at the time of the defendants' actions. Id. In the instant case, Shipp claims that the WPSO adopted policies and customs that discriminated against women victims of domestic violence. Shipp also claims that deputies Shipp and Cropper intentionally declined to arrest Dalton, in spite of his known propensity for violence and his known violation of the TRO and conditions of bail. Shipp also claims that the deputies had encountered Dalton on several occasions with knowledge that a warrant had been issued for his arrest, but yet the deputies declined to arrest him. Our 12(b)(6) analysis confines us to accept these allegations as true, and thus we find that the alleged conduct was not objectionably reasonable. Therefore, we affirm the district court's ruling to

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[12] In McKee, the court held that the plaintiff's Equal Protection claim failed to survive summary judgment because the plaintiff provided insufficient evidence to show that the police department's policies intentionally discriminated against women victims of domestic abuse. That result is not controlling here since the burden of proof under Rule 56(c) is substantially higher than that required under Rule 12(b)(6).

deny the defendants' assertion of qualified immunity at this juncture.[13]

Because we are of the view that Shipp's Equal Protection claims should be allowed to proceed forward, we affirm the district court's decision to retain supplemental jurisdiction over Shipp's state law claims. See 28 U.S.C. § 1367.

CONCLUSION

We AFFIRM the district court's rulings, and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED.

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[13] Our ruling should not be interpreted as relieving the plaintiff of the obligation of producing sufficient evidence beyond the face of the pleadings to sustain her claims. "Summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial." Crawford El, 523 U.S. 574, 118 S.Ct. at 1597. As such, we merely find that based on the fact of the pleadings, Shipp's claims should go forward.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31317

CHERIE SHIPP, JERRY GATES

Plaintiffs-Appellees,

versus

ROYCE L. MCMAHON, Sheriff of Webster Parish, Louisiana STEVE CROPPER, Webster Parish Sheriff's Office Deputy BETTY SHIPP, Webster Parish Sheriff's Office Deputy THEODORE L. RISER, Sheriff of Webster Parish Louisiana,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana, Shreveport Division

(Entered December 5, 2000)

ON PETITION FOR REHEARING

(Opinion January 1, 2000, 5th Cir., 2000, ___ F.3d ___)

Before POLITZ and STEWART, Circuit Judges, and LITTLE, District Judge of the Western District of Louisiana, sitting by designation.

CARL E. STEWART, Circuit Judge:

The petition for panel rehearing is GRANTED. The opinion, 199 F.3d 256 (5th Cir. 2000), is VACATED, and the following opinion is substituted:

This case involves the defendants-appellants' challenge to the district court's denial of their motion to dismiss the plaintiffs-appellees' claims brought under 42 U.S.C. §§ 1983 (1994) and state tort law. The defendants-appellants moved to dismiss the plaintiffs-appellees' claims under Fed.R.Civ.Proc. 12(b)(6) claiming qualified immunity. The district court denied the defendants-appellants' motion. For the reasons stated below, we REVERSE the district court's ruling.

Factual and Procedural History

Plaintiff-appellee Cherie Shipp ("Shipp") was involved in an abusive marriage with her husband, Dalton Shipp ("Dalton") in Shreveport, Louisiana. To escape her husband's abuse, Shipp moved into her sister's home near Minden, Louisiana. When Dalton learned of Shipp's whereabouts, he made several threatening phone calls to her, which she reported to deputies of the Webster Parish Sheriff's Office ("WPSO"). On several occasions, Dalton also drove by the home of Shipp's sister. Shipp reported these "drive-bys" to defendant-appellant Steve Cropper ("Cropper"), a Webster Parish deputy. Cropper informed Shipp that he would do nothing about Dalton.

Shipp then moved to her cousin's residence in Dubberly, which is also in Webster Parish. Dalton went to the house in Dubberly, attacked Shipp by beating her with a telephone that he ripped from the wall, and hit her with his fist. He forewarned Shipp that if she reported the incident to law enforcement, she would "find herself in the hospital."

After physically abusing her, Dalton took some items belonging to Shipp and her cousin, placed them in his automobile, and drove off. Despite Dalton's admonition, Shipp called the WPSO. Deputy Cropper came to the scene and took a report, but made no immediate effort to arrest Dalton.

Several days later, Deputy Cropper approached Dalton about returning the items that he took from the residence of Shipp's cousin, but did not arrest him. Afterward, Dalton was allowed to turn himself in, and he was charged with simple criminal damage to property and simple battery, both misdemeanor offenses. As a condition of bail, the court ordered that Dalton stay away from Shipp. Dalton pleaded guilty to both offenses, and the court ordered him to seek immediate counseling. The court set sentencing for a later date.

Shipp obtained a temporary restraining order ("TRO") that prohibited Dalton from having any contact with her. After Deputy Cropper served Dalton with the TRO, Dalton made several abusive and threatening phone calls to Shipp, which Shipp reported to the WPSO. She was told that nothing could be done about the phone calls, and despite his violations of the TRO and the bail order, the WPSO did not arrest Dalton.

Dalton failed to appear in court for sentencing on the criminal charges, and a bench warrant for his arrest was issued. Although Dalton eventually appeared in court to answer other unrelated criminal charges at the Webster Parish courthouse, deputies nonetheless failed to arrest him for violating the TRO and conditions of bail.

Approximately four months after Dalton failed to appear at the scheduled sentencing hearing for the offenses committed against Shipp, Dalton tracked down Shipp at her other sister's house and convinced Shipp to come out of the house and get into his car. Once in the car, Dalton sped away with Shipp's feet dragging the ground. She attempted to jump out of the car, but Dalton grabbed her by the head and drove Shipp to a house that he had leased in Webster Parish.

Shipp's sister telephoned her mother, Carolyn Gates, who reported the incident to the WPSO. Defendant-appellant Betty Shipp, Dalton's mother, was the dispatcher who received the phone call. Apparently, she hung up the telephone without conducting an inquiry into the particulars of the incident before advising Deputy Cropper of the call. He chose to take no action, despite his knowledge of Dalton's propensity for violent behavior. Neither Cropper nor Betty Shipp dispatched information to alert the other deputies.

After Betty Shipp terminated the phone call, Shipp's mother called the Minden Police Department, which dispatched an emergency alert and radioed the WPSO. Shipp's mother then picked up Jerry Gates, Shipp's father, and drove to the Webster Parish courthouse. They observed Deputy Cropper standing idly outside the courthouse. Cropper advised Mr. Gates that he intended to do nothing to apprehend Dalton. After they discussed where Dalton may be located with Shipp, Mr. Gates denounced Cropper's unwillingness to act, and told him that he was heading to Dalton's leased house. Deputy Cropper and another deputy pursued Mr. Gates.

Subsequently, Mr. Gates and four deputies arrived at the house. When the deputies made no effort to enter the house, Mr. Gates attempted to approach the house, but was

restrained by the deputies. Cropper then knocked on the door, explaining that he had to ascertain whether Shipp was voluntarily in the house with Dalton. No one inside answered Cropper's knock.

At Dalton's house, Mr. Gates observed what he believed to be a silhouette on a curtain showing a person with a gun. Mr. Gates again attempted to approach the house, but the deputies ordered him back. A shot rang out from the house and the deputies immediately retreated to their vehicles to put on armored vests. Another shot rang out as the deputies remained crouched behind their cars.

Inside the house, Dalton had raped Shipp. After shooting her in the chest with a 12-gauge shotgun, he shot himself. Shipp staggered to the door and unsuccessfully attempted to open it. She screamed for help, but none of the deputies responded. Shipp eventually staggered out a side door holding her entrails in her hands.

As she exited the house, Shipp's mother and a deputy raced to her aid. Mr. Gates also dashed toward Shipp, but Cropper abruptly intercepted him. At Cropper's order, another deputy handcuffed Mr. Gates and removed him from the scene.

Shipp was transported to a hospital, where she underwent emergency surgery. She was hospitalized for several weeks, followed by rehabilitation, therapy, and more surgery. Dalton recovered from his wounds and was subsequently charged with aggravated rape, aggravated kidnapping, and attempted second degree murder. Following the incident, the WPSO took no disciplinary action against any deputy.

In February 1997, Shipp and Mr. Gates filed an action under 42 U.S.C. §§ 1983 in federal district court against Sheriffs Royce McMahon and Theodore Riser,[14] and WPSO deputies Shipp and Cropper ("defendants"). Shipp and Mr. Gates claimed that the defendants violated their federal constitutional due process and Equal Protection rights. Shipp and Gates also alleged claims based on Louisiana state tort law. The defendants moved to dismiss under Fed R.Civ.P. 12(b)(6). In January 1998, the magistrate judge filed a report recommending that: (1) all of Shipp's federal constitutional claims, with the exception of the Equal Protection claim and the related failure to train claim, be dismissed with prejudice; (2) all federal claims by plaintiff Jerry Gates be dismissed with prejudice, and (3) all claims against Sheriff Theodore L. Riser be dismissed with prejudice, and (4) the motion be denied in all other aspects. The district court adopted the magistrate judge's findings and recommendation. The district court also exercised supplemental jurisdiction over the state tort law claims and ordered Shipp to file a reply to the assertion of qualified immunity by deputies Cropper and Shipp. After reviewing Shipp's reply to the qualified immunity issue, the district court found that Shipp had met the pleading requirements articulated in Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995) (en banc), and denied the defendants' motion to dismiss. The defendants now appeal the district court's ruling denying their motion to dismiss based on qualified immunity.

Standard of Review

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[14] Sheriff Riser succeeded Sheriff McMahon after the rape and shooting incident.

Denials of motions to dismiss on qualified immunity grounds are appealable collateral orders when based on issues of law. Mitchell v. Forsyth, 472 U.S. 511, 525, 105 S.Ct. 2806, 86 L. Ed. 2d 411 (1985); Champagne v. Jefferson Parish Sheriff's Office, 188 F.3d 312 (5th Cir. 1999)(per curiam). We review the district court's ruling under Rule12(b)(6) de novo. Lowrey v. Texas A & M University System, 117 F.3d 242, 246 (5th Cir. 1997). A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, 677 F.2d 1045, 1050 (5th Cir.1982). The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true. Campbell v. Wells Fargo Bank, 781 F.2d 440, 442 (5th Cir.1986). The district court may not dismiss a complaint under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957). This strict standard of review under Rule 12(b)(6) has been summarized as follows: "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1357 (2nd ed.1990).

Discussion

The defendants argue that they are entitled to qualified immunity because Shipp failed to plead that the defendants violated clearly established law. In other words, the defendants maintain that when the alleged improper conduct occurred, there existed no clearly established law recognizing an Equal Protection claim based on law

enforcement policies, practices, and customs toward domestic abuse cases.

Qualified Immunity

The qualified immunity analysis involves a two-step process. First, we examine whether the plaintiff has alleged a violation of a clearly established constitutional right. See Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); Wooley v. City of Baton Rouge, 211 F.3d 913, 919 (5th Cir. 2000). If the court determines that the plaintiff has alleged a violation of a clearly established constitutional right, the next step is to determine whether the official's conduct was objectively reasonable at the time of the incident. Sanchez v. Swyden, 139 F.3d 464, 467 (5th Cir. 1998); Mangieri v. Clifton, 29 F.3d 1012 (5th Cir. 1994). Thus, if the pleadings on their face show an unreasonable violation of a clearly establish constitutional right, the defense of qualified immunity will not sustain a motion to dismiss under Rule 12(b)(6).

Clearly Established Right

When evaluating a claim of qualified immunity under the "clearly established right" prong, a court first must determine whether the "'plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'" Wilson v. Layne, 526 U.S. 603, 609, 119 S. Ct. 1692, 1697, 143 L. Ed. 2d 818 (1999) (quoting Conn v. Gabbert, 526 U.S. 286, 119 S. Ct. 1292, 1295, 143 L. Ed. 2d 399 (1999)). Thus, we begin our inquiry by addressing domestic assault and Equal Protection.

The first cases testing the viability of an Equal Protection claim relating to law enforcement policies, customs, and practices toward domestic abuse cases were filed in the mid-1970s. However, those cases were ultimately settled before trial.[15] The first reported case holding that a law enforcement policy that treated victims of domestic abuse differently than victims of non-domestic assault constituted an Equal Protection violation was decided in 1984. See Thurman v. City of Torrington, 595 F. Supp. 1521, 1531. (D. Conn. 1984) (denying the police officers' motion to dismiss and declaring that the plaintiff's allegation that the officers intentionally afforded victims of domestic assault less protection than victims of other assault was sufficient to state an Equal Protection claim).

In 1989, the Supreme Court decided Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). Although the main issue in Deshaney involved the plaintiff's substantive due process claim regarding the defendant's failure to remove timely the plaintiff, a minor-child, from his abusive father's custody,[16] the Court in footnote three provided pivotal language that has formed the foundation for contemporary Equal Protection challenges to law enforcement policies, practices, and customs toward domestic abuse. The Court stated that, "[t]he State may not of course, selectively deny its

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[15] See Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints, 75 Geo. L.J. 667, 677 (1986).

[16] The Court ultimately held that the state did not have a constitutional duty under substantive due process to protect the plaintiff from his abusive father after receiving reports of possible abuse. Deshaney, 489 U.S. at191.

protective services to certain disfavored minorities without violating the Equal Protection Clause." Id. at 189 n.3. (citation omitted).

The same year Deshaney was decided, we addressed for the first time whether a plaintiff's claim based on police inaction, and law enforcement policies and customs that allegedly treated victims of domestic assault differently from victims of other crimes violate the Equal Protection Clause as contemplated by the Supreme Court in Deshaney's footnote three. In McKee v. City of Rockwell, 877 F.2d 409 (5th Cir. 1989), we affirmed a district court's grant of summary judgment asserting that the plaintiff failed to produce sufficient summary judgment evidence to show that the defendants adopted law enforcement policies, customs, and practices that treated victims of domestic assault differently from victims of other crimes. McKee, 877 F.2d at 416. As such, the court left open the questions of whether law enforcement policies, practices, and customs that treat victims of domestic assault differently from victims of other crimes constitute intentional discrimination against women under Washington v. Davis, 426 U.S. 299, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), and whether such policies discriminate against protected minorities within the meaning of Deshaney's footnote three. McKee, 877 F.2d at 416.

Approximately eleven years after McKee, we are again called upon to address whether a domestic abuse victim's complaint against a law enforcement agency and its officials for failure to effectuate an arrest, and for their adoption of policies, practices, and customs that discriminate against victims of domestic assault constitute intentional discrimination against women, and thus is cognizable under the Equal Protection Clause. Specifically, Shipp claims that the defendants through their policies, practices, and customs

afforded less protection to victims of domestic assault than other assault victims. Furthermore, Shipp claims that these policies, customs, and practices disproportionately impact women because an overwhelming majority of the victims of domestic assaults are women. The issues raised in Shipp's complaint invoke the unresolved questions of McKee.

Before addressing McKee's unresolved questions, we recognize that governmental policies, which create neutral classifications that have a disproportionate adverse impact upon a protected class, are unconstitutional under the Equal Protection Clause only if the disproportionate impact can be traced to a discriminatory purpose. Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 272, 99 S. Ct. 2282, 2292, 60 L. Ed. 2d 870 (1979). Thus, the Equal Protection clause of the Fourteenth Amendment prohibits a state from engaging in intentionally discriminatory conduct that has an adverse disparate impact on women unless the state can show an "exceedingly persuasive justification for that action." See United States v. Virginia, 518 U.S. 515, 530, 116 S. Ct. 2264, 2274, 135 L. Ed. 2d 735 (1996). State policies that perpetuate antiquated and outdated gender stereotypes that are derogatory and condescending toward women do not form the basis for proper discriminatory purpose. See Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S. Ct. 331, 73 L. Ed. 2d 1090 (1982).

In addressing the questions McKee left open, we observe that courts from other circuits have addressed similar Equal Protection challenges based on law enforcement policies, practices, and customs that treat victims of domestic assault differently from other crime victims. In Watson v. City of Kansas City, 857 F.2d 690 (10th Cir. 1988), a victim of domestic assault brought a §§ 1983 action against a city, the city's police department, and several police officers acting

in their official capacities for adopting policies, practices, and customs that provided less protection to domestic assault victims than other assault victims. In addressing the victim's claim, the Watson court articulated a legal standard that domestic assault victims must meet to sustain an Equal Protection challenge. The Watson court declared that to maintain an Equal Protection claim, the plaintiff must show: (1) that a policy or custom was adopted by the defendants to provide less protection to victims of domestic assault than to other assault victims; (2) that discrimination against women was the motivating factor for the defendants: (3) and that the injury was caused by the operation of the policy or custom. See Watson 857 F.2d at 694.

Several other circuits have adopted the standard articulated in Watson to review Equal Protection claims brought by victims of domestic assault. See Soto v. Fores, 103 F.3d 1056, 1066 (1st Cir. 1997) (stating that,"[u]nder the standard we adopt today, Soto must show that there is a policy or custom of providing less protection to victims of domestic assault than to other victims, that gender discrimination is a motivating factor, and that Soto was injured by the practice"); Ricketts v. City of Columbia, 36 F.3d 775, 779 (8th Cir. 1994) (applying the Watson standard to an Equal Protection claim against a municipality); Eagleston v. Guido, 41 F.3d 865, 878 (2d Cir. 1994) (applying the Watson standard); Hynson v. City of Chester, 864 F.2d 1026, 1031 (3rd Cir. 1988) (announcing that,"[w]e agree with the Watson court that if the categories used by the police in administering the law are domestic assault and nondomestic assault, this is not sufficient to raise a claim for

gender-based discrimination absent a showing of an intent, purpose or effect of discriminating against women").[17]

We agree with our sister circuits that the standard articulated in Watson represents a coherent approach for courts to review Equal Protection claims pertaining to law enforcement's practices, policies, and customs toward domestic assault cases. First, the standard allows law enforcement officials the flexibility and discretion to adopt and employ policies that are tailored to address the special concerns that domestic assault cases raise without compromising the protective services that law enforcement provides.[18] Law enforcement "discretion is essential to the criminal justice process." McCleskey v. Kemp, 481 U.S. 279, 297, 107 S. Ct. 1756, 1769, 95 L. Ed. 2d 262 (1972). Furthermore, law enforcement officials will be liable only for those policies, practices, customs, and conduct that are the product of invidious discrimination. While statistical evidence showing disproportional impact is probative on the

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[17] Although the Ninth Circuit has not specifically adopted Watson, the court in Balistreri v. Pacifica Police Dept, 901 F.2d 696, 701 (9th Cir. 1990), has recognized that an animus against abused women coupled with law enforcement's differential treatment of domestic assault cases may support a gender-based Equal Protection claim.

[18] Because domestic assault cases usually involve parties in volatile intimate or familial relationships, we acknowledge that special law enforcement tactics may be employed in these instances that may be impracticable in other assault cases. As one court noted, " there are inherent differences between domestic disputes and nondomestic disputes, . . . that may affect an officer's decision to arrest or not to arrest in any given situation." Ricketts, 36 F.3d at 781.

issue of gender-based motivation, such evidence without a showing of intent is insufficient to sustain an Equal Protection claim. See Washington v. Davis, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L. Ed. 2d 597 (1976). Finally, the causation requirement will hold law enforcement officials accountable only for injuries that result from inaction or conduct pursuant to invidious policies, customs, and practices. As such, law enforcement would not be held liable for generalized harms that are not traceable to their conduct, policies, or customs. Furthermore, law enforcement would not be called to answer for those injuries that are solely attributable to the perpetrators of the underlying domestic assault.

Therefore, today we join the circuits that have adopted Watson's approach, and hold that to sustain a gender-based Equal Protection claim based on law enforcement policies, practices, and customs toward domestic assault and abuse cases, a plaintiff must show: (1) the existence of a policy, practice, or custom of law enforcement to provide less protection to victims of domestic assault than to victims of other assaults; (2) that discrimination against women was a motivating factor; and (3) that the plaintiff was injured by the policy, custom, or practice. By adopting this approach to answer the pretermitted question in McKee, we accomplish one of the principal goals of qualified immunity, which is to provide objective standards so that "an official [can] be expected to know that certain conduct [] violate[s] statutory or constitutional rights." Harlow v. Fitzgerald, 457 U.S. 800, 819, 102 S. Ct. 2727, 2378-79, 73 L. Ed. 2d 396 (1982).

We turn now to consider Shipp's claim. In order to defeat the defendants' assertion of qualified immunity, Shipp must show that the criteria above were clearly established at

the time of the alleged improper conduct that formed the basis of her complaint.

To show that a right is clearly established, the plaintiff does not have to refer to precedent that is directly on point, or that declares that the conduct in question is unlawful. Rather, the right is clearly established if based on pre-existing law, the unlawfulness of the conduct in question is apparent. Doe v. Independent School Dist., 15 F.3d 443, 455 (5th Cir 1994)(en banc), cert. denied, 506 U.S. 1087, 113 S.Ct. 1066, 122 L. Ed. 2d 371 (1994). In other words, the right is clearly established if its "contours . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 438 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Additionally, we conduct a "snapshot" inquiry by canvassing the legal rules that were clearly established at the time of the official's alleged improper conduct. See Anderson, 438 U.S. at 639. Furthermore, in determining whether a right is clearly established, we are confined to precedent from our circuit or the Supreme Court. Boddie v. City of Columbus, 989 F.2d 745, 748 (5th Cir. 1993).

To date, the only other case in our circuit that has spoken on this Equal Protection issue is McKee. Since our holding in McKee, there has been no intervening precedent from this circuit or the Supreme Court addressing an Equal Protection claim based on law enforcement policies, practices, and customs toward victims of domestic assaults. Although McKee was decided a year after Watson, McKee contains no language rejecting or approving the standard articulated in Watson. Thus, we recognize that the delicately counterpoised competing considerations undergirding the doctrine of qualified immunity and their resulting jurisprudence are instructive in the case at bar. Persons whose

federal rights have been violated by government officials' abuse of their positions should have a means of vindication that includes pursuing monetary compensation. But government officials should be uninhibited by the chilling specter of civil litigation and personal liability to exercise the discretion requisite to perform their duties so long as the officials' conduct does not violate clearly established law. See Owen v. City of Independence, 445 U.S. 622, 651, 100 S. Ct. 1398, 63 L. Ed. 2d (1980); Anderson, 483 U.S. at 638; Harlow v. Fitzgerald, 457 U.S. at 814. Based upon this tenuous balance, courts have narrowly adjudicated issues of qualified immunity largely to the benefit of government officials. See Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct 1092, 89 L. Ed. 2d 271 (1986) (stating that qualified immunity will protect "all but the plainly incompetent or those who knowingly violate the law"); Johnson v. Fankell, 520 U.S. 911, 117 S. Ct. 1800, 138 L. Ed. 2d 108 (1997); Jones v. City of Jackson, 203 F.3d 875, 883 (5th Cir. 2000) (stating "[q]ualified immunity is a shield from civil liability for 'all but the plainly incompetent or those who knowingly violate the law'") (quoting Malley, 475 U.S. at 341); Mendenhall v. Riser, 213 F.3d. 226 (5th Cir. 2000). Accordingly, we hold that the defendants are entitled to qualified immunity because the standard we pronounced above was not clearly established by the Supreme Court nor our circuit prior to our opinion today. See Wilson, 526 U.S. at 614-618 (granting qualified immunity because media ride-alongs during the execution of a search warrant were not a clearly established violation of the Fourth Amendment, despite the Court having declared such conduct violates the Fourth Amendment).

Class of One Equal Protection Claims

Notwithstanding the defendants being entitled to qualified immunity against Shipp's gender-based Equal Protection complaint regarding the policies, customs, and practices of the WPSO toward domestic violence victims, recent Supreme Court precedent suggests that an alternative Equal Protection claim may be available to Shipp. In Village of Willowbrook v. Olech, 528 U.S.562, 120 S. Ct. 1073, 1074-75, 145 L. Ed. 2d 1060 (2000), the Court held that the Equal Protection Clause can give rise to a cause of action on behalf of a "class of one" even when the plaintiff does not allege membership in a protected class or group. To state a claim sufficient for relief, a single plaintiff must allege that an illegitimate animus or ill-will motivated her intentionally different treatment from others similarly situated and that no rational basis existed for such treatment. Id.

Although no general constitutional right to police protection exists, the state may not discriminate in providing such protection. McKee, 877 F.2d at 418 (Goldberg, J., dissenting in part and concurring in part). Applying the rationale of Olech, the Seventh Circuit addressed the consequences of unequal police protection under the Equal Protection Clause.[19] The court reasoned that in the unusual setting of "class one" equal protection cases alleging unequal police protection, demonstrating that the unequal police protection had no rational basis requires a plaintiff to "present evidence that the defendant deliberately sought to deprive

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[19] This court has yet to confront an Equal Protection challenge in the context of a class of one claim. See Bryan v. City of Madison, 213 F.3d 267, 277 n.18 (5th Cir. 2000) (stating "[w]e have never specifically addressed whether such a motive would be enough to support an equal protection claim without some other class-based discrimination, but that issue is not before us").

him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position." Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000). Moreover, the court reasoned that such an improper motive is critical and opined that its absence will defeat an Equal Protection challenge to unequal police protection. Id.

According to the complaint, Betty Shipp was intimately involved in the situation that precipitated the case at bar. Not only is she Dalton's mother but she was also a deputy in the WPSO during the time he stalked, threatened, and harassed Shipp as well as when Dalton pled guilty to charges of criminal damage to property and simple battery as a result of his attacking Shipp and taking her belongings. Betty Shipp was still a WPSO deputy when the aforementioned behavior prompted the court to issue a temporary restraining order against Dalton prohibiting harassment or abuse of or contact with Shipp as well as when the court issued a bench warrant for Dalton's arrest following his subsequent failure to appear.

Moreover, the pleadings further allege that Betty Shipp actually received the call of Carolyn Gates, Shipp's mother, alerting the WPSO that Dalton had kidnapped Shipp, warning them that the situation was volatile, and beseeching the officers to intervene. Betty Shipp responded by hanging up on Carolyn Gates, and although she advised Cropper of the call, neither deputy dispatched a radio transmission to inform other deputies of Carolyn Gates' complaint. Consequently, after he malevolently kidnapped Shipp, Dalton brutally raped and viciously shot her in the chest with a 12-gauge shotgun.

It is undisputed that Betty Shipp's son engaged in reprehensible behavior against her daughter-in-law that finally resulted in law enforcement and judicial intervention. It is not improbable that Betty Shipp developed some animosity against her daughter-in-law during her volatile relationship with Dalton or after Shipp fled when Dalton's escalated abuse prompted criminal charges against him. If deputy Betty Shipp did foster ill-will against her daughter-in-law that ultimately influenced the level of protection Shipp received from the WPSO, Shipp may be able to establish an unequal police protection claim within the framework elucidated in Village of Willowbrook v. Olech. As such, the district court should allow Shipp to amend her complaint accordingly.

Conclusion

We REVERSE the district court's denial of the defendants' motion to dismiss under Fed.R.Civ.Proc. 12(b)(6), and hold that the defendants are entitled to qualified immunity. We REMAND to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Supreme Court, U.S.
FILED
APR 23 2001
OFFICE OF THE CLERK

(2)

No. 00-1392

In The

Supreme Court of the United States

CHERIE SHIPP, JERRY GATES,

Petitioners,

versus

ROYCE L. MCMAHON, Sheriff of Webster Parish, Louisiana; Webster Parish Deputy Sheriffs STEVE CROPPER and BETTY SHIPP; and THEODORE RISER, JR., Sheriff of Webster Parish, Louisiana,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

Preface:

On May 19-20, 1996, Dalton Shipp kidnapped, raped, and shot his estranged wife, Cherie Shipp. In this action, Cherie Shipp claims that since Dalton Shipp was not incarcerated in May of 1996, defendants failed to protect Cherie and thus violated her constitutional rights. Cherie Shipp alleges that if Dalton had been charged with aggravated battery instead of simple battery for a domestic violence incident that occurred in November of 1995, then Dalton might have been in jail on May 19, 1996, and thus, he would not have been able to carry out his criminal acts that night against Cherie.

The Court of Appeals found that defendants were entitled to qualified immunity and remanded to the district court to allow plaintiff to amend her complaint.

Question for Review:

1. Whether the Fifth Circuit Court of Appeals correctly found that the defendants were entitled to qualified immunity since the law of equal protection in the domestic violence context was not clearly established in 1996.

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STATEMENT REGARDING JURISDICTION

The District Court denied defendants' motion to dismiss based on qualified immunity. On rehearing, the Fifth Circuit Court of Appeals granted defendants' motion based on qualified immunity and remanded this matter to the District Court to allow plaintiff another opportunity to amend her Complaint. Plaintiff seeks to have this Court review the Fifth Circuit's ruling that granted qualified immunity.

An order dismissing claims against the defendants on the basis of qualified immunity while plaintiffs still have other claims pending in the district court would not be appealable in the circuit courts. The circuit courts have uniformly held that such an order does not satisfy the collateral order doctrine. Unlike an order that denies a defendant's qualified immunity, an order granting qualified immunity may be effectively reviewed after final judgment. *Baird v. Palmer,* 114 F.3d 39 (4th Cir. 1997).

Petitioners are still proceeding against the defendants-respondents in the district court. This Court should refuse to review this matter since it does not satisfy the collateral order doctrine.

STATEMENT OF THE CASE

During the night of May 19, 1996, Cherie Shipp and Dalton Shipp, who were going through a divorce, were talking at Cherie's apartment. Cherie voluntarily left her apartment with Dalton and got into his car. Later that

night they went to their former matrimonial domicile, and Dalton raped and shot Cherie.

Cherie claims that if Dalton had been in jail, he could not have hurt Cherie. Cherie alleges that if Dalton had been charged with aggravated battery instead of simple battery for a separate incident that occurred in November of 1995, then Dalton might have been in jail and thus not able to carry out his criminal acts. Basically, Cherie claims that law enforcement officers violated her right to equal protection by failing to ensure that Dalton was charged with a more serious crime for the November 1995 incident and then appropriately prosecuted and sentenced.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit correctly applied *Wilson v. Layne* in determining that the relevant law was not clearly established.

Defendants-Respondents filed a motion to dismiss based on qualified immunity. The district court denied defendants' motion. Defendants appealed to the Fifth Circuit Court of Appeals. Initially, the Court of Appeals agreed with the district court finding that the law of equal protection was clearly established. *Shipp v. McMahon*, 199 F.3d 256 (5th Cir. 2000). On rehearing, however, the Fifth Circuit judges unanimously *disagreed* with the district court judges and found that the relevant law was not clearly established. The Court of Appeals vacated its initial opinion and granted defendants' motion based on qualified immunity. *Shipp v. McMahon*, 234 F.3d 907 (5th Cir. 2000). According to this Court,

when "judges thus disagree on a constitutional question," law enforcement officers are entitled to qualified immunity. *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 1701, 143 L.Ed.2d 818 (1999).

> The officers in this case cannot have been expected to predict the future course of constitutional law. . . . If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.

Wilson, 1701; *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 860, 55 L.Ed.2d 24 (1978).

Petitioner, Cherie Shipp ("Shipp"), contends that the Fifth Circuit used the wrong law to determine whether the relevant law was clearly established.[1] According to Shipp, the Fifth Circuit judges erred when they looked to a case of "controlling authority in their [own] jurisdiction" and found the relevant law was not clearly established. *Wilson*, 1700. In essence, Shipp argues that the law of determining whether the relevant law was clearly established is not clearly established; therefore, in this case, defendants are not entitled to qualified immunity. The flawed logic is designed to distract and divert. Shipp claims that the Fifth Circuit ignored a "consensus of cases of persuasive authority" from other circuits. *Wilson*, 1700. However, in order to reach the alleged "consensus" from

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[1] Shipp's first contention is stated as follows: "May a circuit court disregard 'a consensus of cases of persuasive authority,' *Wilson v. Layne*, 526 U.S. 603, 617 (1999), from other circuits in ascertaining clearly established law for purposes of qualified immunity?" Petition for a Writ of Certiorari ("Petition"), p. 5.

other circuits, Shipp would have the Fifth Circuit ignore binding authority from the Fifth Circuit itself, i.e., *McKee v. City of Rockwall, Tex.*, 877 F.2d 409 (5th Cir. 1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 727, 107 L.Ed.2d 746 (1990).[2]

In searching for clearly established law, courts look first to the Supreme Court. If this Court has not clearly identified the contours of the relevant law, courts turn to "cases of controlling authority in their jurisdiction at the time of the incident." *Wilson*, at 1700. If their own circuit is silent on the matter, courts may then look to see if a "consensus of cases of persuasive authority" exists. *Id.*

In this case, the Fifth Circuit judges found there was no Supreme Court case on point, so they turned to "controlling authority in their jurisdiction at the time of the incident." *Id.* They found that *McKee v. City of Rockwell*, supra, a prior Fifth Circuit case, provided the proper precedent for determining whether the law was clearly established. *McKee* addressed an equal protection claim in the domestic violence context, but explicitly left pivotal issues unresolved. *Shipp*, 234 F.3d 912-913. Since the Fifth Circuit found that its own binding precedent was "controlling authority," Cherie Shipp accuses the Fifth Circuit of using a "tunnel-vision approach." Petition, p. 6. The "conflict among the circuits" which Shipp perceives does not exist in this case. Petition, p. 6.

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[2] Shipp would have the Fifth Circuit ignore its own case law because *McKee* discussed the law of equal protection while granting a motion for summary judgment filed by defendants, and, therefore, according to Shipp, *McKee* is not good nor relevant law.

The critical issues that *McKee* left open had not been resolved on May 19, 1996. *Shipp*, 234 F.3d 913, 915. There had been no intervening authoritative decision. *Shipp*, at 915. Shipp's handful of cases from other circuits do not constitute a "consensus" of persuasive authority. Those decisions did not even address, much less settle, the issues which *McKee* carefully identified as unresolved. Those decisions do not articulate nor support Shipp's position in a consistent nor well reasoned manner. To find that the law was clearly established in the Fifth Circuit in 1996 would mean that *McKee* had somehow, unwittingly been overruled by an "untidy body of case law." *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987).

Shipp has not provided any acceptable rationale for having the Fifth Circuit ignore its own case law. For a court to follow its own decisions is not "tunnel-vision," as Shipp argues. In determining whether the relevant law is clearly established, courts should look for "cases of controlling authority in their jurisdiction at the time of the incident." *Wilson*, at 1700. *McKee* is a case of controlling authority in the Fifth Circuit. Accordingly, in this case, the Fifth Circuit's basic research was "confined to precedent from our circuit or the Supreme Court." *Shipp*, 915. There was no need nor reason to look any further.[3]

As indicated above, the judges who heard and studied this matter in detail disagreed on the constitutional questions involved. That disagreement alone is sufficient

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[3] As demonstrated below, the result (i.e., that defendants are entitled to qualified immunity) would be the same even if the Fifth Circuit had found it necessary to search other jurisdictions for some kind of persuasive authority.

to establish the defendants' qualified immunity. *Wilson*, 1701. In this case, Shipp's convoluted argument that courts should use "persuasive authority" rather than "controlling authority" lacks merit.

II. The Fifth Circuit correctly found that the law of equal protection in the domestic violence context was not clearly established in 1996.

To overcome defendants' qualified immunity, Shipp must demonstrate that the law of equal protection in the domestic violence context was clearly established prior to May 19, 1996. As her basic premise, Shipp assumes that the law was clearly established, and then concludes that the Fifth Circuit was wrong since it found the law was not clearly established. Shipp's circular reasoning begs the question.

In her second contention to this Court, Shipp argues that the Fifth Circuit erred by requiring the law to be identified on "too specific a level." Petition, p. 10. Shipp claims that the appropriate "level of factual similarity" for determining clearly established law is found in the Equal Protection Clause, *DeShaney*'s[4] Footnote 3, and "the floor debates of Reconstruction-era Congress." Petition, pp. 9-10. Shipp's alleged "clearly established" law exists on far too abstract a level. Shipp attempts to identify the law on a "level of generality" that bears "no relationship

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[4] *DeShaney v. Winnebago County, et al.*, 489 U.S. 189, 109 S.Ct. 998 (1989).

to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

What does Shipp say the law is? Shipp has repeatedly been challenged to identify the clearly settled law which she claims existed. However, Shipp has consistently failed to identify any prevalent authority on a relevant level that recognizes or establishes the law to be as she maintains. Stripped of the colorful excess and generalities, Shipp proposes that police officers should be liable when a woman is injured by her husband in a domestic violence incident, if the husband has been involved in some other incident for which he might have been arrested or could have been sentenced to serve some time in jail.

Originally, Shipp alleged that officers violated the Due Process Clause of the Fourteenth Amendment by failing to protect Shipp. However, the due process claim was dismissed pursuant to *DeShaney v. Winnebago County*, supra. Shipp then added a conclusory allegation that defendants had an intent to discriminate. By adding the bald, conclusory allegation, Shipp attempted to transform her proposition that is not cognizable under the Due Process Clause in a viable Equal Protection claim. According to *DeShaney* and *McKee*, "There is no constitutional violation when the 'most that can be said of . . . state functionaries . . . is that they stood by and did nothing when suspicious circumstances dictated a more active role.' 109 S.Ct. at 1007. Footnote three does not permit plaintiffs to circumvent the rule of *DeShaney* by converting every Due Process claim into an Equal Protection claim via an allegation that state officers exercised

their discretion to act in one incident but not in another." *McKee*, 877 F.2d at 413. Thus, plaintiffs are not allowed to take an uncognizable Due Process claim and convert it into an Equal Protection claim by simply adding conclusory allegations of improper motive.

When qualified immunity is raised, plaintiff has the burden to show "clearly established . . . authority" that finds "the law to be as the plaintiff maintains." *Garramone v. Romo*, 94 F.3d 1446, 1451 (10th Cir. 1996). Without any meaningful analysis, Shipp refers to a short string of cases for an alleged "consensus" of persuasive authority. Petition, p. 5. However, the handful of cases that Shipp refers to are not sufficient to clearly establish well developed legal principles on the relevant level.

> A mere handful of decisions of other circuits and district courts, which are admittedly novel, cannot form the basis for a clearly established constitutional right. . . .

Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177-78 (6th Cir. 1988).

> We cannot extract a clearly established right from a somewhat confusing body of caselaw through the use of hindsight, or permit claims of qualified immunity to turn on the eventual outcome of a hitherto problematic constitutional analysis.

Soto v. Flores, 103 F.3d 1056, 1065 (1st Cir. 1997).

The cases cited by Shipp do not reveal the law to be as Shipp maintains. Most of the cases are not even relevant in the qualified immunity analysis. *Soto v. Flores* was not decided until 1997, a year after the Shipp incident.

McDonald v. City of Chicago[5] is an unpublished district court opinion from another circuit. *Hakken v. Washtenaw County*[6] is another district court case from another circuit; it was not decided until Sept. 29, 1995, just weeks prior to Dalton Shipp's initial arrest in November of 1995. *Hynson v. City of Chester*[7] and *Watson v. City of Kansas City*[8] were decided prior to *DeShaney* and *McKee*, and thus, could not have authoritatively addressed the concerns nor answered the questions left open by *DeShaney* and *McKee* for a law enforcement officer on the street in the Fifth Circuit.[9] The cases cited by Shipp are readily distinguishable from the propositions which Shipp advocates. None of them find individual law enforcement officers liable for a constitutional violation. They address conduct that is more egregious than that described by Shipp; yet the cases do *not* define the outer limits of legally permissible police conduct.

Two of Shipp's cases are revealing however (and contrary to Shipp's arguments) in that they find that *just prior* to the Shipp incident and *just after* the Shipp incident the relevant law was *not* clearly established.

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[5] 1994 WL 732865 (N.D. Ill. Dec. 23, 1994).

[6] 901 F.Supp. 1245 (E.D.Mich. 1995).

[7] 864 F.2d 1026 (3d Cir. 1988).

[8] 857 F.2d 690 (10th Cir. 1988).

[9] *DeShaney* had a profound impact on Fourteenth Amendment rights and the nature of § 1983 claims against law enforcement officers for an alleged failure to protect a person from the criminal acts of a third person. Any alleged clearly established law must consider the effect of *DeShaney*'s principles and rationale and would have necessarily been written after *DeShaney*.

> Currently, there is no definitive Sixth Circuit or Supreme Court decision determining that police policies for handling domestic disputes may violate the victims' right to equal protection on the basis of their sex or status as victims of domestic violence. At the time of the alleged incidents in this matter, it was not "clearly established" that the equal protection rights of women and victims of domestic violence was violated when the police accorded different treatment to their calls for assistance in a domestic dispute. . . . The individual Defendants' motion for summary judgment should be granted.

Hakken, 901 F.Supp. at 1254 (E.D.Mich. 1995).

> In a matter of first impression for this court, we adopt [a] standard for section 1983 equal protection claims brought by domestic violence victims.

Soto, 103 F.3d at 1066 (1st Cir. 1997).

The clearly established law inquiry requires the court to "determine the extent to which the relevant constitutional doctrine is developed in the context of similar fact patterns . . . For a defendant to be held liable, then, relatively little legal ambiguity can be tolerated." Nahmod, Sheldon H., *Civil Rights and Civil Liberties Litigation – The Law of Section 1983*, 4th Ed., Vol. 2, § 8:18, "What is Clearly Settled Law?" pp. 57-58. The cases cited by Shipp do not delineate the outer parameters of lawful conduct. Shipp's cases describe factual scenarios in which the conduct of the officers involved does *not* violate the constitution. The cases do not set forth well developed

legal principles that reveal the bright line between lawful and unlawful conduct in the domestic violence context.

The concept of "clearly established law" in a civil case is the equivalent of the "fair warning" requirement in the criminal context. *United States v. Lanier*, 117 S.Ct. 1219, 1227 (1997). "Fair warning" requires that the law be written "in language that the common world will understand what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear. . . . The principle is that no man shall be held . . . responsible for conduct which he could not reasonably understand to be proscribed. . . . The fair warning requirement . . . bars enforcement of a [law] which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . . Fair warning [is ensured] by so resolving ambiguity in a [law] as to apply it only to conduct clearly covered. . . . [The fair warning requirement] bars courts from applying a novel construction of [law] to conduct that neither [a] statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.* at 1224-1225.

In order for the law to be "clearly established" in the relevant sense, qualified immunity requires there be "fair warning" and a clear outline of the boundaries of permissible conduct. *United States v. Lanier*, 117 S.Ct. 1219, 1227 (1997). To be clearly established, the law must be defined in a particularized, fact-specific manner. *Anderson v. Creighton*, supra.

In *McKee*, several unanswered questions concerning the relevant area of constitutional law were expressly left

open. Those questions cannot be retroactively resolved. In cases where there is a legitimate question whether the law is settled, it cannot be said that the law was clearly established. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 2820, n. 12 (1985).

> When an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. [*U.S. v. Lanier*, 117 S.Ct. at 1227.]

In *McKee*, facts and circumstances which were more egregious and more immediate than those alleged by Shipp were not sufficient to show there was differential or discriminatory treatment toward women. Thus, the Fifth Circuit expressly did "not decide whether other elements of an equal protection claim were present." *McKee*, at 416.

> In particular, we do not decide whether . . . a policy discriminating against victims of domestic violence . . . would constitute intentional discrimination against women . . . or whether that policy would discriminate against a protected minority within the meaning of *DeShaney*'s footnote three. [*Id.*]

The issues of whether a policy that discriminates against domestic violence victims constitutes unlawful discrimination against women or discrimination against a protected class were expressly not answered and were not clearly established. Further, what constitutes the "other elements of an equal protection claim" for selective denial of protective services was not addressed and was

expressly not answered. *Id.*[10] At the time of the Shipp incident, these issues had not been revisited and clarified by this Court or any other court.

On an abstract level, the Fourteenth Amendment prevents a State from "selectively deny[ing] its protective sevices to certain disfavored minorities." *DeShaney,* 109 S.Ct. at 1004, n. 3. However, on the more relevant fact-specific level, there is no constitutional violation when the most that can be said is that police "stood by and did nothing." *DeShaney,* 109 S.Ct. at 1007; *McKee* at 413. A law enforcement officer has discretionary authority. Simply because an officer could make an arrest, he is not under any constitutional obligation to do so. *McKee* at 414. Plaintiffs are not permitted to circumvent an officer's discretionary authority by converting a Due Process claim into an Equal Protection claim by simply adding a conclusory allegation of intent to discriminate. *McKee* at 413.

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[10] Shipp argues that this is a "straight forward claim of discriminatory enforcement of the laws." Petition, pp. 8-9. However, Shipp's arguments fail to distinguish between discriminatory enforcement of criminal laws and selective denial of governmental services. Shipp does not claim she was impermissibly arrested because she was a woman. Shipp claims that she did not receive some unspecified benefit or protective service. Note that Shipp never identifies anyone who received the benefit which Shipp says she did not get.

CONCLUSION

Section 1983 is not the insurer of every crime victim. Society is not prepared to charge law enforcement officers with the burden of providing monetary damages to victims of domestic abuse simply because a victim makes conclusory allegations of intent to discriminate. The judges involved in this case did not agree on what constituted the law of equal protection in the domestic violence context prior to 1996. Thus, "it is unfair to subject police to money damages" for failing "to predict the future course of constitutional law." *Wilson,* at 1701.

The Fifth Circuit Court of Appeals was correct in finding that the defendants are entitled to qualified immunity. Shipp's writ application should be denied.

Respectfully submitted,

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